

SUPREME COURT OF THE UNITED STATES

DOCKETED TERM 1903

No. 237

CALIFORNIA OREGON RAILWAY, PLAINTIFF

VS.

JOHN H. BURTON

OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

(24,905)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 622.

NEVADA-CALIFORNIA-OREGON RAILWAY, PLAINTIFF IN
ERROR,

vs.

JOSEPH BURRUS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

INDEX.

	Original.	Print
Transcript of record from the district court of Washoe county (omitted in printing).....	<i>a</i>	
Trial, etc. (omitted in printing) ..	<i>b</i>	
Proceedings, November 22 and 23, 1911.....	2	1
Reporter's certificate	5	2
Testimony of Joseph Burrus.... (omitted in printing) ..	6	
M. R. Hart..... (" ") ..	68	
Mrs. M. Jones.... (" ") ..	75	
Mrs. G. W. Greenough (omitted in print- ing).....	85	
Mrs. Joseph Burrus (omitted in print- ing).....	91	
Harry R. Brunsmalre (omitted in print- ing).....	100	

	Original.	Print
F. J. Gurley..... (omitted in printing) ..	120	
Herbert B. McNamara.....	147	3
W. H. O'Neal..... (omitted in printing) ..	149	
Bert Robinson ... (" ") ..	150	
C. B. Clark..... (" ") ..	164	
Joseph Burrus (recalled) (omitted in printing).....	174	
Agnes Mary Mitchell (omitted in printing).....	176	
Charge (omitted in printing) ..	189	
Verdict (" ") ..	197	
Reporter's certificate (" ") ..	199	
Amended complaint (omitted in printing) ..	201	4
Demurrer (omitted in printing) ..	211	
Demurrer overruled (" ") ..	214	
Leave to file amended answer..... (" ") ..	216	
Notice of motion to strike from amended complaint (omitted in printing) ..	217	
Order denying motion..... (omitted in printing) ..	226	
Answer to amended complaint.....	227	8
Proceedings, November 24, 1911.....	239	14
Minutes of motion for leave to file amended complaint.....	239	14
Notice of motion for leave to file amendment to amended answer, proposed amendment, affidavit, etc. (omitted in printing).....	243	
Proceedings, November 25, 1911.....	252	16
Motion for non-suit denied..... (omitted in printing) ..	257	
Order allowing three days to file exceptions to instructions given and refused..... (omitted in printing) ..	258	
Instructions refused (" ") ..	261	
Special questions refused..... (" ") ..	269	
Verdict (" ") ..	272	21
Judgment (" ") ..	274	21
Exceptions to instructions and to refusal to give instructions and special interrogatories to jury (omitted in printing).....	278	
Notice of intention to move for new trial.....	287	22
Memorandum of errors on motion for new trial.....	290	23
Order denying a new trial.....	295	26
Order extending time, etc..... (omitted in printing) ..	296	
Stipulation and order extending time, etc. (omitted in printing).....	298	
Specification of errors.....	299	26
Notice of appeal..... (omitted in printing) ..	302	
Bond on appeal..... (" ") ..	303	
Stipulation as to record..... (" ") ..	305	
Opinion, Talbot, C. J.....	307	28
Judgment (" ") ..	315	33
Order denying rehearing.....	317	34
Consent of modification of judgment.....	318	35

INDEX.

iii

	Original.	Print
Petition for writ of error..... (omitted in printing) ..	319	
Order allowing writ..... (" ") ..	323	
Assignment of error..... (" ") ..	324	
Citation (" ") ..	326	
Writ of error..... (" ") ..	327	
Bond on writ of error..... (" ") ..	330	
Admission of service..... (" ") ..	332	
Præcipe for transcript of record..... (" ") ..	333	
Clerk's certificate (" ") ..	334	
Order and stipulation extending time, etc. (omitted in printing) ..	335	
Statement of errors to be relied on and designation by plaintiff in error of parts of record to be printed, with proof of service.	339	35

Additional proceedings 38



* * * * *

1 & 2 In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

No. 7939.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY COMPANY, a Corporation, Defendant.

Be it remembered that on the 22nd day of November, A. D. 1911, at the hour of ten o'clock a. m. the following, among other proceedings, were had and heard in the above entitled action before his Honor, Hon. L. N. French, Judge presiding.

The plaintiff was present in person and by his attorneys Messrs. Mack, Green, Brown & Heer; the defendant was represented by James Glynn, Esq.

The Court: Enter the order Mr. Clerk that Mrs. A. R. Shewalter report the testimony and proceedings in the trial of this case until the return of Mr. Rogers, the Official Reporter. You may swear Mrs. Shewalter.

(A. R. Shewalter is sworn in as Reporter pro tempore by the Clerk of the Court.)

3 (The jury was duly impaneled and sworn by the Clerk to try the case. Complaint and answer were thereupon read to the jury. Statement made for plaintiff by Judge George S. Brown of the firm of Mack, Green, Brown and Heer, of what they expected to prove for plaintiff. Also statement made by James Glynn, Esq., of what the defendant expected to prove.)

The Court: Call your first witness?

Mr. Brown: You may be sworn Mr. Burrus.

(JOSEPH BURRUS sworn by the Clerk as a witness.)

Mr. Brown: Mr. Burrus take the witness stand.

Mr. Glynn: If the Court please, at this time, I wish to object to any testimony whatever being introduced under the complaint in this case, on the ground that the complaint does not state facts sufficient to constitute a cause of action in a particular in which the complaint can not be amended, only by proof—I would not assume it could be amended by any other means.

That question will arise, and that point must be met and determined in this case at sometime along during the trial of this case, and it is my duty to call the attention of the Court to it, as I view it, at this time. That the contract alleged in the plaintiff's complaint

is a contract that is illegal, and forbidden by law under the Inter-State Commerce Act, and any such contract so made, the parties making it are subject to a fine by reason of the fact that there was no published tariff providing for the running of special trains for the exclusive use of anybody, and it devolves upon the plaintiff to plead, and prove, those conditions under the decisions and authorities

4 which I can show to the Court.

The Court can see it is not a captious matter, or a matter that has been presented before in this case, and the law is to the effect that the plaintiff can not recover on an illegal contract, or for any breach of an illegal contract.

(The objection was thereupon argued by counsel for plaintiff and defendant during the entire day.)

The Court: Court will be in recess until ten o'clock tomorrow.

5 STATE OF NEVADA,
County of Washoe, ss:

I, A. R. Shewalter, Official Reporter pro tempore of the Second Judicial District Court of the State of Nevada, In and for the County of Washoe, do hereby certify:

That as such official Reporter pro tempore I was present in said Court on the 22nd day of November, A. D. 1911, and took the proceedings as set forth in the foregoing three pages, during the hearing of the case of Joseph Burrus, plaintiff vs. Nevada-California-Oregon Railway Company, a corporation, defendant, No. 7939. That the foregoing proceedings as set forth in the said three pages, is a full, true, accurate and correct statement of the proceedings had and heard, and is a full, true, accurate and correct transcription of my shorthand notes taken at the time, to the best of my knowledge and ability.

Dated Reno, Nevada, May 10, A. D. 1912.

A. R. SHEWALTER,
Reporter pro tempore.

6-146 Court re-convened at 10:00 o'clock a. m. of Thursday November 23rd, and the case proceeded as follows:

Lew Rogers, reporting.

The Court: You may call the roll of jurors.

The Clerk: (Called the roll.) All present, your Honor.

The Court: In regard to the objection made yesterday, I have read through the cases very thoroughly that were cited and I have come to the conclusion that in a case of this kind, that it is not necessary to allege in the complaint as a condition precedent that the law of the Inter-State Commerce Commission, or Rules, were complied with by the defendant at the time the contract was made. There are cases in which perhaps, it would be necessary for the allegations to be made in, but I do not think that this is one of those cases. The objection will be overruled.

Mr. Glynn: To which the defendant excepts on the grounds that

the complaint does not state a cause of action and it does not show that the alleged contract was a legal contract, is, or was a legal contract, at the time it was entered into under the provisions of the Interstate Commerce Act.

The Court: You may proceed.

Mr. Brown: Mr. Burrus, you may take the stand.

Whereupon, Mr. JOSEPH BURRUS, the plaintiff came forward, and, after being duly sworn, took the stand and testified in his own behalf as follows:

* * * * *

147 Direct examination of Herbert B. McNamara:

(By Mr. Glynn:)

Q. Your name is what?

A. Herbert B. McNamara.

Q. You are in the employ of the defendant company, are you?

A. I am.

Q. In what capacity?

A. Traffic manager.

148-200 Q. In your capacity as traffic manager, you have charge of the tariff rates and publications?

A. I have.

Q. On the 22nd day of January, I will ask you to state whether there was a tariff rate in existence which had been made by this defendant, by your company, filed with the Inter State Commerce Commission, and published by this, your company covering the hiring of a special train, or the price to be collected or charged for the transportation of any person or persons on any such special train over that road.

Mr. Brown: Object; it is wholly irrelevant and immaterial and not within the issues made in this case; not tending to prove or disprove any allegations of the complaint or prove any affirmative matters in the answer.

Mr. Glynn: We now offer to prove by this witness and expect him to testify in the negative in response to the question I have just propounded to him.

The Court: The same old question?

Mr. Glynn: Well, it is to get the record correct.

The Court: The objection will be sustained.

That is all, Mr. McNamara. Mr. O'Neill.

* * * * *

201 In the District Court of the Second Judicial District of the State of Nevada, in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Amended Complaint.

Comes now the plaintiff in the above entitled action and by leave of the Court first had and obtained, files this his amended complaint, and for cause of action against defendant: alleges:

I.

That the said defendant now is, and at all times mentioned herein was, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and doing business in Washoe County, Nevada.

II.

That the said defendant is, and at all times herein mentioned was, engaged as a common carrier of passengers and freight for hire, in the operation of a railroad in the said county of Washoe, and Lassen County, California, extending from the City of Reno, in said County of Washoe, to and through a place called Doyle, in said
202 County of Lassen and to a place called Amedee, in said County of Lassen.

III.

That on or about the 22nd day of January, A. D. 1911, one Archibald P. Burrus, a son of plaintiff, was dangerously ill at or near the said Doyle; that on the said twenty-second day of January, 1911, and at and before the making of the contract herein after alleged, the plaintiff had been informed that his son was at or near said Doyle and dangerously ill; that he was suffering from blood poisoning, and that it was necessary for the preservation of his health that he be removed with all possible haste and speed to the said City of Reno, where he might receive medical attention and treatment, and that if such removal were delayed for even a very short space of time, it was likely to result in the death of said Archibald P. Burrus, for lack of medical treatment.

IV.

That on the mor-ing of the said 22nd day of January, 1911, and before the hour of six o'clock a. m., upon said day, the plaintiff and defendant entered into an agreement whereby the defendant promised and agreed, for and in consideration of the sum of one hundred and twenty-five (\$125.00) dollars, which sum was at said time paid by the plaintiff to the defendant, to furnish to and for the use of

the plaintiff a special train and thereby to convey the plaintiff from the said City of Reno to the said Doyle, and to return from said Doyle to said City of Reno with the plaintiff and his said son; that at the time of making said contract, the plaintiff informed the defendant of the condition of his said son and of the necessity of his speedy
203 and immediate removal to said city of Reno for medical treatment, and of the danger of the life of his said son of any delay in such removal and treatment; and that the plaintiff, at and before the time of said agreement, otherwise imparted to the defendant all knowledge and information then possessed by the plaintiff concerning the condition of his said son, the nature of his illness, and the necessity and reason therefore of such immediate and speedy removal and treatment; that the defendant then and there agreed to start said train from said City of Reno at six o'clock a. m. on the said 22nd day of January, 1911, and to run the same with all possible haste and speed to said Doyle, carrying thereon the plaintiff, and that said train upon arriving at said Doyle should be immediately and with all possible haste and speed returned to the said City of Reno with the plaintiff and his son.

V.

That the said defendant instead of running said train as it had agreed, wantonly and wilfully and without any good cause therefore, delayed the departure of said train until twenty minutes past six o'clock a. m. on said 22nd day of January, 1911; that upon the arrival of said train at said Doyle the said defendant, instead of returning the said train with all haste and speed to the said City of Reno, wilfully, fraudulently and maliciously represented to the plaintiff that it was necessary to run said train on to the said Amedee and back for the purpose of procuring fuel oil for the engine of said
204 train; that the plaintiff was then ignorant as to whether or not said engine required oil or whether the same might be obtained at said Amedee, and relied upon and believed the representations of said defendant in that behalf; that the defendant did then so run the said train to the said Amedee and back to said Doyle; and that said train in making said trip to said Amedee and back to said Doyle, was gone from said Doyle for a space of time in excess of two hours; that it was unnecessary for the said defendant to run said train to said Amedee for the purpose of procuring fuel oil, and that it was unnecessary to procure more oil than was already upon said engine for the running of the same to the said City of Reno; that the defendant did not procure oil at said Amedee or at any other place on said trip between said City of Reno and said Amedee or return; but on the contrary thereof, at said Amedee the defendant took upon said train a large number of persons, to be transported thereon as passengers for hire, from said Amedee to the said City of Reno, and that the defendant did so transport the said passengers from said Amedee to said City of Reno upon said train and did collect from said passengers the usual fare for such transportation amounting to the sum of four and 20/100 dollars each.

VI.

That upon the return of said train to said Doyle the defendant further wilfully, wantonly and maliciously failed, refused and neglected to return said train speedily to the said City of Reno with the plaintiff and his said son, but further as said Doyle delayed the said train for the purpose of attaching thereto, and did attach thereto a freight car loaded with cattle, and did return said freight car loaded with cattle with and as a part of said train, to the said City of Reno carrying also upon said train the said plaintiff and his said son; that the carrying of said car of cattle as a part of said train further delayed the arrival of said train at said City of Reno.

VII.

That at other stations between said Doyle and the said City of Reno, the defendant accepted and carried for hire upon said train, divers and sundry other passengers.

VIII.

That by reason of the delay in said train and the failure of the defendant to start the same upon the time agreed upon the plaintiff was caused to, and did suffer great delay and inconvenience; that by reason of the running of the said train from said Doyle to Amedee and return, the plaintiff was deprived of the use thereof for a long space of time, to wit, for the space of more than two hours, and was caused to, and did, suffer during said two hours great bodily pain and inconvenience in being required to wait for said train at Doyle for the time of said delay; that at the time of said delay there was much snow upon the ground at said Doyle; the weather was extremely cold and the station at said Doyle in which the plaintiff was required to and did wait during said delay, was poorly heated and otherwise lacking in reasonable comforts for occupancy, and the plaintiff, during such delay, and by reason thereof, suffered from such cold and inconvenience. That by reason of the carrying of said passengers upon said train as aforesaid, plaintiff was deprived of the exclusive use of the same for which he had aforesaid contracted, and was greatly annoyed and inconvenienced and discommoded physically by reason of said passengers on said train.

IX.

That by reason of the negligent, wanton and malicious acts of the defendant hereinbefore set forth, the said train carrying the said plaintiff and his said son, was delayed for a long period of time to wit, for more than three hours beyond the time when it would or should have arrived at said City of Reno had the same been so run as agreed by the defendant with all possible haste and speed; and that thereby medical treatment of the said Archibald P. Burrus was greatly delayed, and this plaintiff then at all times since and now

believes, and has believed that the life of said Archibald P. Burrus was further greatly endangered.

X.

That since said 22nd day of January, 1911, the said Archibald P. Burrus has died of his said illness; and that the plaintiff at the time of such death believed and has ever since, and does now, believe that if the said train had been so run from said City of Reno to the said Doyle and back to said City of Reno with all due haste and speed so that said Archibald P. Burrus might have had earlier treatment for his said illness, he would not have died of said illness.

207

XI.

That neither the plaintiff nor his said son or anyone for them, ever consented to any of said wrongful and negligent acts of the defendant in and about the running of said train.

XII.

That the usual and customary fare charged by the said defendant for the transportation of each passenger upon its train from the said City of Reno to said Doyle is the sum of three and 25/100 dollars, and such fare from the said Doyle to the said City of Reno is likewise the said sum of three and 25/100 dollars.

XIII.

That at the time and by reason of such wilful, wrongful and negligent acts of the defendant in and about the running of said train as aforesaid, the plaintiff was caused to suffer, and has at all times since suffered, and does now still suffer much worry and anxiety and great mental pain and anguish.

XIV.

That by reason of the premises and of the said wrongful, wilful, wanton, malicious and negligent acts of the defendant, the plaintiff has been damaged in the sum of twenty thousand dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of twenty thousand dollars and for costs.

MACK, GREEN BROWN & HEER,

Attorneys for Plaintiff.

208 STATE OF NEVADA,
County of Washoe, ss:

A. A. Heer, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled action; that said plaintiff is absent from the County of Washoe, and State of Nevada, and that the facts in the said complaint stated are within the knowledge of affiant and for that reason he makes this verification; that he has read the foregoing Amended Complaint and knows the

contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

A. A. HEER.

Subscribed and sworn to before me this 23rd day of June, 1911.

[SEAL.]

C. E. MACK,
Notary Public.

Service of a copy of the foregoing Amended Complaint admitted this 24th day of June, 1911.

DODGE & BARRY,
Attorneys for Defendant.

209-226 Endorsed: No. 7939. In the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe. Joseph Burrus, Plaintiff, vs. Nevada-California-Oregon Railway Co., a corporation. Defendant, amended complaint. Filed this 24th day of June, 1911, W. A. Fogg, Clerk. Mack, Green, Brown & Heer, I. O. O. F. Temple, Reno, Nevada, Attorneys for Plaintiff.

* * * * *

227 In the Second Judicial District Court of the State of Nevada in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Answer.

Now comes the defendant, above named, and answering plaintiff's Amended Complaint on file herein, admits alleges and denies, as follows:

I.

Answering paragraph III., of plaintiff's Amended Complaint, the defendant, according to its information and belief, denies that on or about the 22nd day of January, 1911, one Archibald P. Burrus, the son of the plaintiff, was dangerously ill at or near the said town of Doyle, or was dangerously ill at all; and denies that on the said 22nd day of January, 1911, and at and before the making of the contract in plaintiff's amended complaint thereafter alleged or at all, the plaintiff had been informed that his said son was at or near Doyle and dangerously ill, or dangerously ill at all; and denies that said son was suffering from blood poisoning or at all, and that it was necessary for the preservation of his health that he be removed with all possible haste and speed or otherwise, to the said City of Reno or elsewhere, where he might receive medical treatment and attention; and denies that he was informed that if such removal were delayed for even a short space of time or at all;

it was likely to result in the death of said Archibald P. Burrus, for lack of medical treatment or at all.

II.

Answering paragraph IV. of plaintiff's amended complaint defendant denies that the alleged agreement referred to in said paragraph was entered into on the 22nd day of January, 1911, or at any other time, or at all; and denies that plaintiff on said day or at all informed defendant of the necessity or any necessity for the speedy and immediate removal of said Archibald P. Burrus to the said City of Reno for medical treatment or for any other purpose or of any danger to the life of said Archibald P. Burrus if he should not be speedily removed to said City of Reno; and according to its information and belief defendant denies that the plaintiff at or before the time of said alleged agreement or at all imparted to defendant all knowledge or information then possessed by plaintiff concerning the condition of his said son or concerning the nature of his illness or concerning the necessity, and reason thereof, of speedy and immediate removal and treatment; and denies that defendant agreed with plaintiff that said train should be run to Doyle with all possible haste and speed; and denies that defendant agreed with plaintiff that upon arriving at said Doyle that said train should be immediately and with all possible haste and speed returned to said City of Reno with plaintiff and his said son; and in this behalf defendant alleges; that on the evening of January 21st, 1911,

229 it was agreed between plaintiff and defendant that upon the payment of \$125 to defendant by plaintiff, that defendant would run an engine and coach to Doyle on said evening or at such other time as plaintiff might desire to carry plaintiff to Doyle and bring his said son to Reno on the return trip; that defendant was then and there informed by plaintiff, that he, the said plaintiff, had 'phoned the physician who was then in attendance upon said Archibald P. Burrus near said Doyle Station, and was informed by said physician that no haste was necessary in the removal of said Archibald P. Burrus to the said City of Reno. That it was then and there agreed upon by plaintiff and defendant that plaintiff and said train would not start until next morning, the 22nd day of January, 1911, at about six o'clock a. m., and no other or further agreement was then or at all made concerning the running of the said train to Doyle, or concerning the return thereof; except that on the said 22nd day of January, and shortly after said train left Reno carrying plaintiff, it was further agreed, upon said train, by plaintiff and defendant that barring unfor-seen accidents, or delays, defendant would return said train into Reno at about 2:30 p. m. of said day.

230

III.

Answering paragraph V. defendant denies that it wantonly or willfully, or without any good cause thereof, or for any reason, or at all, delayed the departure of said train until twenty minutes past six o'clock A. M. on said 22nd day of January, 1911, and in

this behalf the defendant alleges that any agreement for the running of said train was to the effect that payment for the running of said train was to be made before the departure thereof and that the delay in the departure of said train on the morning of the said 22nd day of January, 1911, from the said City of Reno, as alleged in plaintiff's amended complaint or otherwise, was occasioned by the fact that the said plaintiff had failed and neglected, until a period immediately preceding the departure of said train, to make such payment for the running of said train, and that any such delay was occasioned by no other reason whatsoever; defendant denies that it wilfully, fraudulently and maliciously, or wilfully or fraudulently or maliciously, or at all, represented to the plaintiff that it was necessary to run said train from said Doyle on to said Amedee and back for the purpose of procuring fuel oil for the engine of said train; and denies that it was not necessary at said time for the defendant to run said train from Doyle to Amedee and return; and herein defendant alleges; That for several days immediately prior to the 21st day of January, 1911, defendant's said road from Reno to Doyle, and further north had been blocked with snow and ice, preventing the passage of trains, despite the

231 diligent efforts of defendants to keep it clear, which said condition of said road, plaintiff and defendant well knew at the time said agreement was made; that owing to such conditions, and to enable defendant to return the said train to Reno from Doyle with care and safety, and for the safety of all concerned, and that a more speedy return to Reno should be made; it was necessary, and to the interest of plaintiff; that said train should be run to Amedee, a distance of twenty miles beyond Doyle, and the engine of said train there turned around, and not to back said train from Doyle to Reno, a distance of fifty miles; and defendant did run said train to Amedee without delay, and did there turn said engine and return said train to Doyle without further delay whatsoever, save that necessarily occasioned by the turning of said engine, and at Amedee did take on snow bound travelers, and at Doyle did attach a car of cattle to said train, as of right it could, and should do; but defendant denies that the said run to Amedee, or the taking on of said travelers, or the attaching of said car of cattle to said train, caused any annoyance, discomfort or inconvenience to plaintiff or his said son; and denies that any delay beyond the time said train should have arrived in Reno, was caused thereby; that had said train been backed from Doyle to Reno it would not have reached Reno until a much later hour than it did arrive and such backing would have been impracticable and dangerous.

The plaintiff at the time of making any agreement concerning said train, and for several days prior thereto—well knew the weather conditions along said road from Reno northerly, and to, and
232 at Doyle, and beyond Doyle; and well knew there was much snow upon the ground at Doyle, and well knew that the weather there was extremely cold, and well knew that no train of defendant's said road had arrived in Reno for several days prior

thereto, nor could then arrive by reason of said weather conditions; and any agreement entered into by plaintiff and defendant, concerning said train and the running thereof, was made and entered into with full knowledge and reference to such conditions.

IV.

Answering paragraph VI., defendant denies that upon the return of said train to said Doyle the defendant further willfully, wantonly and maliciously, or willfully, wantonly or maliciously failed and refused, and neglected, or failed or refused or neglected to return said train speedily to the said City of Reno with the plaintiff and his said son; and denies that the defendant further, at said Doyle, or at all, delayed the said train for the purpose of attaching thereto, a freight car loaded with cattle, and denies that the carrying of said car of cattle as a part of said train further delayed or at all delayed the arrival of said train at said City of Reno; and in this behalf the defendant alleges: That prior to said 22nd day of January defendant was informed that a car of cattle was at said Doyle for several days waiting for shipment to Reno, and that such cattle were suffering, and had been suffering for want of food and shelter and that upon request and to prevent their further suffering, as well as for hire, defendant, attached said car of cattle to said
233 train, as of right it could, and should do.

V.

Answering paragraph VII., defendant alleges that said train did make certain station stops on the return from Doyle to Reno; and at the request of plaintiff did stop at a station called Constantia for more than seven minutes, and did there take on bedding and sundry bundles for plaintiff.

VI.

Answering paragraph VIII., defendant denies there was any delay caused by defendant in starting said train from Reno, and denies that plaintiff at all suffered great, or any inconvenience in the starting of said train; that if any delay was suffered it was caused by plaintiff himself, as heretofore alleged; and denies that during the time said train was run from Doyle to Amedee plaintiff was deprived of the use thereof; and denies that he was entitled to the use thereof during said time; and denies that he suffered great, or any bodily pain or inconvenience by reason thereof; denies that the station at Doyle at said time was poorly heated, or otherwise lacking in reasonable comforts for occupancy; and denies that the said plaintiff, during such delay or by reason thereof, or at all, suffered from cold or inconvenience, or either of them; denies that by reason of carrying
234 of said passengers upon said train, plaintiff was in any manner deprived of the use of the same, and denies that he was entitled to the exclusive use of the same; and denies that he

was greatly, or at all annoyed, inconvenienced or discommoded physically or otherwise by reason of said passengers upon said train.

VII.

Answering paragraph IX., denies that defendant committed any act which was wanton and malicious, or negligent in or about the running of said train, and denies that any act charged against defendant in plaintiff's complaint was malicious, wanton or negligent, to the injury of plaintiff; and denies that said train was delayed for more than three hours, or at all delayed beyond the time when it should have arrived at Reno by reason of any malicious, wanton or negligent act of the defendant, or at all. And denies that said train was to be at all run with all possible haste and speed; and denies that medical treatment of the said Archibald P. Burrus was greatly or at all delayed to his detriment. Denies that said plaintiff now believes, or has ever believed that the life of Archibald P. Burrus was at all endangered by reason of any alleged delay in running said train.

VIII.

Answering paragraph X., of plaintiff's amended complaint, defendant, according to its information and belief, denies that the said Archibald P. Burrus died of said illness; denies that plaintiff did believe at the time of the death of said Archibald P. Burrus, or that he has ever since or does now, believe that were it not for the alleged delay in running said train that the said Archibald P. Burrus might have had earlier treatment for his said illness, and that if so, he would not have died of said illness, and in this connection defendant alleges that Archibald P. Burrus lived for six weeks after being brought to Reno; and during said time did recover from said illness, and alleges that his death was wholly due to other causes, and not through or by reason of any act of this defendant.

IX.

Answering paragraph XI., defendant denies that plaintiff never consented to the running and conducting of said train in the particulars complained of;

X.

Answering paragraph XIII., of plaintiff's amended complaint, defendant, according to its information and belief, denies that at the time of, and by reason of the said alleged to be willful, wrongful and negligent acts of the defendant in and about the running of said train as set forth in said paragraph, or at any time or at all, the plaintiff was caused to suffer and has at all times suffered, and does now still suffer much worry and anxiety and great mental pain and anguish, or either or any of them.

XI.

Denies that by reason of premises and of said alleged to, wrongful, willful, wanton, malicious and negligent acts of the defendant, or either or any act of the defendant the plaintiff has been damaged in the sum of twenty thousand dollars, or in any sum whatever.

Wherefore, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein expended.

JAMES GLYNN,
Attorney for Defendant.

237 STATE OF NEVADA,
County of Washoe, ss:

W. H. O'Neil, being first duly sworn, deposes and says that he is the Assistant Traffic Manager of the Nevada-California-Oregon Railway, the corporation defendant in the above entitled action, and as such makes this verification and on behalf of said defendant. Affiant further says that he has read the above and foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except — to those matters which are therein stated upon information and belief, and as to those matters that he believes it to be true.

W. H. O'NEIL.

Subscribed and sworn to before me this 13th day of November, 1911.

[SEAL.]

F. P. DANN,
*Notary Public in and for the
County of Washoe, State of Nevada.*

238 Endorsed: Original. No. 7939. In the Second Judicial District Court of the State of Nevada in and for Washoe County. Joseph Burrus, Plaintiff, vs. Nevada-California-Oregon Railway, a corporation, Defendant. Answer (Amended.) Service of the within, by copy, admitted November 13th, 1911. Mack, Green, Brown & Heer, Attorneys for Plaintiff. Filed this 13th day of Nov. 1911. W. A. Fogg, Clerk, by S. R. Tippet, Deputy. James Glynn, Attorney for Defendant.

239 In the Second Judicial District Court of the State of Nevada
in and for the County of Washoe.

FRIDAY, November 24, 1911—10:00 o'clock a. m.

Present: Hon. L. N. French, Judge; C. P. Ferrel, Sheriff; W. A. Fogg, Clerk.

JOSEPH BURRUS

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation.

This being the time to which the above entitled action was continued, the Plaintiff and his Attorneys, Mack, Green, Brown and Heer, and the Defendant by its attorney, James Glynn, Esq., being present in Court, the roll of jurors was called and all answered to their names.

The Court at this time rendered its decision on Defendant's motion to strike out the answer of Joseph Burrus and ordered Defendant's motion denied.

Defendant excepted to the ruling of the Court on the grounds set forth in the Reporter's notes of the trial.

Defendant moved to file an amendment to the answer.

Plaintiff objected to the granting of the Motion on the grounds set forth in the Reporter's notes.

The Motion was argued by counsel for the respective parties and the Court, being fully advised in the premises ordered Plaintiff's objection sustained.

240 Defendant then rendered the amendment to answer to the Clerk for filing and the Court ordered the Clerk mark the paper "Rendered for filing."

Joseph Burrus resumed the stand and testified further on the part of the Plaintiff.

Plaintiff offered in evidence a receipt from W. H. O'Neil to Mr. Burrus. Objected to by Defendant on the grounds that there was no tariff rate filed, or published at that time. Objection overruled and an exception noted for defendant. Ordered that receipt be admitted in evidence and marked Plaintiff's Exhibit "A."

Defendant moved to strike out Plaintiff's Answer regarding the conversation of Plaintiff and the Master Mechanic on the ground that the Master Mechanic had no authority to make any contract with the Plaintiff. Motion denied and an exception noted for Defendant.

Defendant objected to the answer of Plaintiff regarding the carrying of Archie Burrus on the grounds set forth in the Reporter's notes. Objection sustained.

Defendant objected to the answer of Plaintiff regarding the laying of Archie Burrus on the seat on the ground set forth in the Reporter's notes. Objection sustained.

The hour for the noon recess having arrived, and the case not having been completed, the jury was admonished and excused until

1:30 o'clock, p. m., the case continued until that time and a recess taken.

1:30 o'clock p. m.

241 This being the time to which the above entitled action was continued, the Plaintiff and his attorneys and the defendant and its attorneys, being present in Court, the roll of jurors was called and all answered to their names.

Joseph Burrus resumed the stand and testified further on the part of the Plaintiff.

Defendant moved to strike out the answer of the plaintiff regarding the "Laying Down" of Archie Burrus. Motion denied, and exception noted for defendant.

M. R. Hart was sworn and testified on the part of the Plaintiff.

Defendant moved that the testimony of witness M. R. Hart regarding the condition of Archibald P. Burrus be stricken out on the ground, set forth in the Reporter's notes. Motion denied and an exception noted for the Defendant.

The jury was admonished and a recess taken for ten minutes.

2:30 o'clock p. m.

This being the time to which the above entitled action was continued, the Plaintiff and his Attorneys and the defendant by its Attorney, being present in Court, Mrs. M. Jones and Mrs. George Greenough were sworn and testified on the part of the plaintiff.

Defendant objected to question "Was he at the time in readiness," asked by counsel for the plaintiff, on the grounds set forth in the Reporter's notes. Objection overruled and exception noted for Defendant.

Mrs. Joseph Burrus was sworn and testified on the part of the plaintiff.

Plaintiff rests.

242-251 The jury was admonished by the Court, the case continued and a recess taken for 10 minutes.

3:30 o'clock p. m.

This being the time to which the above-entitled action was continued, the plaintiff and his attorneys and the defendant and its attorney, being present in Court, H. R. Brainstead was sworn and testified on the part of the defendant.

Defendant offered in evidence 5 pictures. Ordered admitted and marked Defendant's Exhibits "A", "B", "C", "D", "E".

The jury was admonished and excused until Saturday, November 25, 1911 at 10 o'clock a. m. Ordered that the case be continued until 10 o'clock a. m. November 25, 1911.

Whereupon a recess was taken until the further order of this Court.

L. N. FRENCH,
District Judge.

* * * * *

252 In the Second Judicial District Court of the State of Nevada,
in and for the County of Washoe.

SATURDAY, November 25, 1911—10:00 o'clock a. m.

Present: Hon. L. N. French, Judge; C. P. Ferrel, Sheriff; W. A. Fogg, Clerk.

JOSEPH BURRUS

VS.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corp.

This being the time to which the above-entitled action was continued, the Plaintiff and his Attorneys, Mack, Green, Brown & Heer and the Defendant by its Attorney, James Glynn, Esq., being present in Court, the roll of Jurors was called and all answered to their names.

Defendant moved to file the Amendment to the Amended Answer and read the Affidavit of Defendant's Counsel in support of the Motion.

Plaintiff objected to the Motion on the grounds set forth in the reporter's notes. The matter was argued by the Counsel for the respective parties and the Court, being fully advised in the premises, ordered Defendant's Motion denied.

F. J. CURLEY was sworn and testified on the part of the Plaintiff.

Defendant objected to the course of cross-examination of Witness F. J. Curley, by the Plaintiff on the grounds set forth in the Reporter's notes.

253 The Objection was argued by counsel for the respective parties and the Court, being fully advised in the premises, ordered the objection overruled. Exception noted for Defendant.

By Mr. Glynn:

Q. State whether or not the wind has been blowing there during the day or night time of that day or for some few days preceding?

A. Well, the wind has a clear sweep there, where the snow drifts in—

Mr. Brown: I move that be stricken out; that is argumentative.

The Court: It is not responsive to that question. That part may be stricken out in regard to the Clear sweep that the wind has.

Mr. Green: And the further objection that the matter is leading.

Q. Did you have any conversation that morning at the station, the 22nd, with reference to turning the engine on the Wye?

Mr. Glynn: Object; it is improper cross examination, nothing of that nature was testified to in the direct examination.

(Discussion.)

The Court: I think he may answer the question.

Mr. Glynn: We except on the ground it is improper, testimony on cross examination, not testified to in the examination in chief.

A. Read the question.

254 Reporter read the question.

A. I don't remember anything about that.

Q. You don't remember any such conversation?

A. No.

Q. Did you tell Mr. O'Neil that you thought it would be unsafe for him to turn the engine on the wye?

Mr. Glynn: Wait a moment. I object if the Court please on the same ground and the further ground it is clearly a fishing expedition of counsel for the Plaintiff, it is improper cross-examination and nothing of that kind was testified to by the witness on his examination in chief.

(Discussion.)

The Court: Let him answer it.

Mr. Glynn: Note our exception on the ground stated.

Q. Did you think anything about that subject at that time?

Mr. Glynn: Now, if the Court please, the question is improper, indefinite and does not tend to elicit anything testified to on direct examination. Make the objection on that ground.

The Court: Objection overruled.

Mr. Glynn: Note our exception on the ground stated.

Q. How long after the 22—or, had you heard at any time after the 22 that there was a complaint made upon the part of Mr. Burrus and his friends that this special had been run to Amedee?

Mr. Glynn: I object to this question on the ground it is improper cross-examination; there is nothing of that nature testified to by this witness on his examination in chief; and further object —
255 this — wholly irrelevant and improper; a little of it is good enough; it is time it was limited.

The Court: Let him answer.

Mr. Glynn: Except to the ruling of the Court on the ground stated.

Q. When did you see the matter in the paper?

Mr. Glynn: Object on the same ground, improper cross-examination, not testified to in any manner by the witness in his examination in chief.

The Court: I think he can answer it.

Mr. Glynn: Exception on the ground stated.

Q. Have you expressed this opinion of yours to others besides us here in Court?

Mr. Glynn: Object it is *imcompetent*, irrelevant and immaterial, and not proper cross-examination; suppose he did? What of it?
(Discussion.)

Q. Well, I will make my question more definite: Have you talked with Mr. O'Neil relative to the testimony which you gave her today?

Mr. Glynn: Object to that if the Court please.

The Court: The objection will be overruled.

Mr. Glynn: On the ground it is improper cross-examination, and except on the same ground.

Q. Have you ever discussed with Mr. O'Neil the question of whether or not that engine could have been turned on that wye that day?

Mr. Glynn: We make the same objection, improper cross-examination.

256 The Court: Objection overruled.

Mr. Glynn: On the ground it is irrelevant; suppose he discussed it with a dozen. I except to the ruling of the Court on the ground stated—improper cross-examination, irrelevant, immaterial.

Q. Will you now say it was not prior to the 18th and that single engine turned on that wye?

Mr. Glynn: Object; it is improper cross-examination.

The Court: Overruled.

Mr. Glynn: Exception.

Herbert V. McNamara and W. H. O'Neil were sworn and testified on the part of the Defendant.

Rebuttal.

Bert Robison and C. B. Clark were sworn and testified on the part of the Plaintiff.

The hour for the noon recess having arrived and the case not having been completed, the Jury was admonished and excused until 1:30 o'clock P. M., and the case continued until 1:30 o'clock P. M.

1:30 o'clock p. m.

This being the time to which the above-entitled action was continued, the Plaintiff and his Attorneys, and the Defendant by its attorney, being present in Court, the roll of Jurors was called and all answered to their names.

Joseph Burrus was recalled and testified further on the part of the Plaintiff.

Defendant objected to the testimony of J. Burrus regarding the conversation he had with W. H. O'Neil on the grounds that it is not proper rebuttal.

257 The objection was overruled and an exception noted for the Defendant.

Defendant moved to strike out the testimony of J. Burrus on the grounds that it was not proper rebuttal and that Defendant was not given any chance to meet it. Motion denied and an exception noted for the Defendant.

AGNES MARY MURPHY was sworn and testified on the part of the Plaintiff.

Mr. Brown: Did you have any conversation with Mr. O'Neil while on the train?

Defendant objected to the question on the grounds set forth in the reporter's notes. Objection overruled and an exception noted for the Defendant.

Mr. Brown: What statement did Mr. O'Neil make to you regarding Mr. Burrus?

Defendant objected to the question on the grounds set forth in the reporter's notes.

The matter was argued by counsel for the respective parties. Defendant objected to a statement of Plaintiff in the argument as shown in the reporter's notes. Defendant moved that Plaintiff write the statement and pass it to the Court. Motion allowed. The statement was read and the Court allowed the Plaintiff to ask the witness the question and an exception was noted for the Defendant.

The jury was admonished and excused until 3:30 o'clock P. M.

Defendant moved the Court for an order for Non-Suit on the grounds set forth in the reporter's notes. Motion denied and exception noted for the Defendant.

258

4:10 o'clock p. m.

The jury returned into Court at 4:10 o'clock P. M., the roll was called and all answered to their names.

The jury was admonished by the Court and excused until 7:00 o'clock P. M.; the case continued until 7:00 o'clock P. M. and a recess taken until that hour.

7:00 o'clock p. m.

This being the time to which the above-entitled action was continued, the Plaintiff and his attorneys and the Defendant^m by its attorney, being present in Court, the roll of jurors was called and all answered to their names.

The case was argued by the attorneys for the respective parties.

On Motion of Plaintiff, the Defendant consenting thereto, it was ordered that the Court read to the jury the first sentence of Section 3160 of the Compiled Statutes of the State of Nevada. The Defendant reserving the right to except to the statute as read on any ground that it desires.

The jury was instructed by the Court, placed in charge of a sworn officer and excused to deliberate of their verdict.

Defendant moved for an order of Court allowing Defendant 10 days in which to file written exception to instructions given and refused. Objected to by the Plaintiff on the ground that all exceptions must be taken before the Jury retires etc. Objection overruled by the Court and exception noted for the Plaintiff on the grounds shown in reporter's notes.

Ordered that Defendant be allowed 3 days in which to file written exceptions to instructions given and refused.

Whereupon a recess was taken to await the return of the Jury.

259

9:50 o'clock p. m.

The Jury returned into Court at 9:50 o'clock p. m., the Plaintiff and his attorneys and the Defendant by its attorney, being present in Court, the roll of Jurors was called and all answered to their names.

In response to the Court the "Foreman" said they had agreed upon a verdict, which verdict reads in words and figures as follows, to-wit:

In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Verdict.

We, the jury impanelled in the above entitled action, find in favor of the plaintiff, and assess the damages in the sum of Ten Thousand Dollars. *Dollars.*

November 25, A. D. 1911.

C. E. BOSWELL, *Foreman.*

Endorsed: 7939. Joseph Burrus et al., vs. Nevada-California-Oregon Railway, a Corp. Verdict. Filed Nov., 1911. W. A. Fogg, Clerk. By S. P. Tippet, Deputy Clerk.

260-271 The Court ordered that the Clerk record the verdict and read the verdict recorded.

The Defendant excepted to the verdict of the jury on the grounds shown in the reporter's notes of the trial.

The Jurors were excused until 10:00 o'clock A. M., Monday, December 4th, 1911.

Whereupon a recess was taken until the further order of the Court.

L. N. FRENCH,
District Judge.

* * * * *

272 In the Second Judicial District Court of the State of Nevada
in and for the County of Washoe.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Verdict.

We, the jury impanelled in the above entitled action, find in favor of the plaintiff, and assess the damages in the sum of Ten Thousand Dollars.
dollars.

November 25, A. D. 1911.

C. E. BOSWELL, *Foreman.*

273 Endorsed: 7939. Joseph Burrus et al. vs. Nevada-California-Oregon Railway c Corp. Verdict. Filed Nov. 25, 1911. W. A. Fogg, Clerk, by S. R. Tippet, Deputy Clerk.

274 In the District Court of the Second Judicial District of the State of Nevada in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Judgment.

This action came on regularly for trial. The said parties appeared by their attorneys, Messrs. Mack, Green, Brown and Heer, counsel for plaintiff, and James Glynn, Esq., for defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, with the verdict signed by the foreman, and, being called, answered to their names and say:

"We, the jury impanelled in the above entitled action, find *in* in favor of the plaintiff, and assess the damages in the sum of Ten Thousand Dollars.

November 25th, A. D. 1911.

C. E. BOSWELL, *Foreman."*

275 Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged and decreed, that said plaintiff have and recover from said defendant the sum of ten thousand dollars, with interest thereon at seven per cent per

annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$212 00/100.

Judgment recorded the 27th day of November, 1911, Book —, page —.

[SEAL.]

W. A. FOGG, *Clerk.*

276 Endorsed: No. 7939, in the District Court of the Second Judicial District of the State of Nevada, in and for the county of Washoe. Joseph Burrus, Plaintiff, vs. Nevada-California-Oregon Railway, a corporation, Defendant. Judgment. Filed this 27th day of November, 1911. W. A. Fogg, Clerk, Mack, Green, Brown & Heer, I. O. O. F. Temple, Reno, Nevada, Attorneys for Plaintiff. Recorded in Judgment Record. Book H, page 416. W. A. Fogg, County Clerk, by F. K. Unsworth, Deputy Clerk.

277-286 Endorsed: No. 7939. In the Second Judicial District Court of the State of Nevada County of Washoe. Joseph Burrus et al., Plaintiff, vs. Nevada-California-Oregon Ry. Co., Defendant, Judgment Roll. Filed Nov. 27th, 1911. W. A. Fogg, Clerk, by S. R. Tipsett, Deputy Clerk. Mack, Green, Brown & Heer, Attorneys for Plaintiff; Jas. Glynn, Attorney for Defendant.

* * * * *

287 In the Second Judicial District Court of the State of Nevada in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Notice of Intention to Move for a New Trial.

To the above named plaintiff, and his attorneys, Mack, Green, Brown & Heer:

Take Notice: That the above named defendant intends to move the Court to vacate and set aside the verdict and judgment rendered in the above cause, and to grant a new trial of said cause upon the following grounds, to-wit;

1. That this Court has no jurisdiction of the subject of the action.
2. That plaintiff's complaint does not state facts sufficient to constitute a cause of action.

3. Misconduct of plaintiff (the prevailing party) in this; in saying to the jury during plaintiff's closing argument to the jury, "think of that poor boy out there with his frozen feet" then and there objected to by the defendant.

4. Error in denying defendant's motion to strike from plaintiff's complaint, the matter specified in said motion as irrelevant.

288 5. Abuse of discretion amounting to error, in refusing to permit defendant to amend its amended answer by adding thereto the amendment proposed by defendant.

6. Excessive damages appearing to have been given under the influence of passion, or prejudice.

7. Insufficiency of the evidence to justify the vendict, or other decision, and that the same is against the law.

8. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon the minutes of the Court, pleadings and files in the cause, orders of court, documentary evidence, stenographic notes of the testimony given in the cause, instructions of the court given and refused, with written exceptions thereto on file, affidavit of James Glynn, and memorandum of errors to be filed.

JAMES GLYNN,

Attorney for Defendant.

289 Endorsed: No. 7939. Original. In the Second Judicial Court of the State of Nevada, in and for Washoe County. Joseph Burrus, vs. Nevada-California-Oregon Railway, a corporation. Notice of intention to move for a new trial. Service of the within, by copy, admitted. January 30, 1912. Mack, Green Brown & Heer, Attorneys for ———. Filed this 30th day of January, 1912. W. A. Fogg, Clerk, by E. H. Beemer, Deputy. James Glynn, Attorney for Defendant, Reno, Nevada.

290 In the Second Judicial District Court of the State of Nevada in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

To the above named plaintiff and his attorneys, Mack, Green, Brown & Heer:

Take Notice: That upon the hearing of the motion for a new trial in the above cause, the defendant under the eighth ground enumerated in its notice of intention to move for a new trial, intends to rely upon the following errors;

1.

Error of the Court in overruling defendant's demurrer to plaintiff's complaint, and excepted to by defendant.

2.

Error of the Court in denying defendant's motion to strike from plaintiff's complaint, the matter specified in said motion as irrelevant, and excepted to by defendant.

3.

Error of the Court in denying defendant's application to amend its amended answer, by adding thereto its proposed amendment, and excepted to by defendant.

4.

291 Error of the Court in overruling defendant's objection to Joseph Burrus giving any testimony in support of his complaint, on the grounds that said complaint does not state facts sufficient to constitute a cause of action, excepted to by defendant.

5.

Error of the Court in overruling defendant's objection to the plaintiff Joseph Burrus, and plaintiff's witness, M. R. Hart, testifying to a conversation between Joseph Burrus and W. H. O'Neil, prior to, and at the time the said agreement is alleged to have been entered into by plaintiff, relative to the condition of plaintiff's son Archie Burrus and as being the reason why plaintiff wished to engage said train, and excepted to by defendant.

6.

Error of the Court in sustaining plaintiff's objections to the testimony of defendant's witness, H. V. McNamara proposed to be elicited from said witness, to-wit; that at the time said agreement is alleged to have been made, that no passenger rate schedule existed, as required by the Inter State Commerce law, or at all, fixing the rates or charges for the transportation of plaintiff, or any person whatever, by special train on defendants railway, or permitting, or allowing any such train to be run over said road, or to be at all contracted for as by plaintiff alleged, or at all, and excepted to by defendant.

7.

292 Error of the Court in permitting plaintiff's witness, Miss Mitchell to testify against defendant's objection, to matter in chief, by way of rebuttal, to an alleged statement made by W. H. O'Neil to said witness on the train between Amedee and Doyle, to-wit that is Burrus should inquire what was done at Amedee, to tell him that the engine took on oil there, and excepted to by defendant.

8.

Error of the Court in not granting defendant's motion for a non suit, at the close of all the testimony, upon the grounds stated in defendant's written motion on file, and excepted to by defendant.

9.

The Court erred in giving to the jury plaintiff's instructions Numbered, One, Two, and Three, the same being erroneous upon the grounds stated in defendant's written exceptions thereto on file herein; the exception to number three being erroneously stated to be an exception to plaintiff's instruction No. Four, not excepted to.

10.

The Court erred in refusing to give to the jury defendant's instruction to No. Four, upon the ground, and for the reasons stated in defendant's written exception thereto, on file herein.

11.

The Court erred in refusing to give to the jury defendant's instructions numbered seven, eight, and ten, upon the grounds, and for the reasons stated in defendant's written exceptions thereto on file herein.

12.

293 The Court erred in refusing to give to the jury the special questions offered by defendant, and to request the jury to make answer to said questions, or either, or any of them such refusal being erroneous upon the grounds and for the reasons stated in defendant's written exceptions to such refusal on file herein.

13.

Error of the Court in ordering the verdict of the jury to be filed by the Clerk, to which defendant excepted on the grounds, that the verdict is against law, and against the evidence, and the instructions of the Court, and that the verdict is excessive.

JAMES GLYNN,
Attorney for Defendant.

STATE OF NEVADA.

County of Washoe:

James Glynn being duly sworn says, that he now is, and was attorney for defendant on the trial of the cause aforesaid; that in affiant's judgment as such attorney, the exceptions to the aforesaid grounds of error are well taken in the law.

JAMES GLYNN.

Subscribed and sworn to before me this 30 day of January 1912.

[SEAL.]

W. A. FOGG, *Clerk,*

By S. R. TIPPETT, *Deputy.*

294 Endorsed: No. 7939. Original. In the Second Judicial District Court of the State of Nevada, in and for Washoe County. Joseph Burrus vs. Nevada-California-Oregon Railway, a Corporation. Memorandum of Errors on Motion for new trial. Service of the within, by copy, admitted January 30 1912. Mack, Green, Brown & Heer Attorney-for———. Filed this 30th day of January 1912. W. A. Fogg, Clerk. By E. H. Beemer, Deputy. James Glynn, Attorney for Defendant. Reno, Nevada.

295-298 In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

SATURDAY, March 2, 1912—10:00 o'clock a. m.

Present: Hon. L. N. French, Judge; C. P. Ferrel, Sheriff; W. A. Fogg, Clerk.

JOSEPH BURRUS

VS.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corp.

The Court at this time rendered its decision on Defendant's Motion for a new trial, heretofore submitted and ordered that the motion be denied.

Defendant excepted to the ruling of the Court denying the motion for a new trial on the grounds that it is erroneous for the reasons stated in the notice of intention to move for a New Trial and in the memorandum of errors and that the same is contrary to the law in the case.

On Motion of Defendant it was ordered that the Defendant be given up to and including April 30, 1912 in which to prepare, serve and file notice of Appeal and statement on appeal from both the order of the Court denying the motion for New Trial and from the Judgment heretofore entered in this action.

Whereupon a recess was taken until the further order of the Court.

District Judge.

299 In the Supreme Court of the State of Nevada.

JOSEPH BURRUS, Plaintiff and Respondent,

VS.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant and Respondent.

Specification of Errors of the Trial Court, Upon Which Appellant Will Rely in the Supreme Court.

1.

Error in holding that it had jurisdiction of the subject of the action.

2.

Error in holding that plaintiff's amended complaint states a cause of action, and in overruling defendant's demurrer thereto.

3.

Error in denying defendant's motion to strike from plaintiff's amended complaint, the matter specified in said motion as irrelevant.

4.

Error in denying defendant's application to amend its amended answer, by adding thereto its proposed amendment.

5.

Error in overruling defendant's objection to Joseph Burrus giving any testimony in support of his amended complaint on the ground, that it does not state facts sufficient to constitute a cause of action.

300

—

Error of the Court in overruling defendant's objection to the plaintiff *Joseph Burrus*, and plaintiff's witness, *M. R. Hart*, testifying to a conversation between *Joseph Burrus*, and *W. H. O'Neil*, prior to, and at the time the said agreement is alleged to have been entered into by plaintiff, relative to the condition of plaintiff's son *Archie Burrus*, as being the reason why plaintiff engaged said train.

7.

Error of the Court in sustaining plaintiff's objection to the testimony of defendant's witness *H. V. McNamara*, proposed to be elicited from said witness, to-wit, that at the time said agreement is alleged to have been made, that no passenger rate schedule existed as required by the *Inter State-Commerce Law*, or at all, fixing the rates or charges for the transportation of plaintiff, or any person whatever, by special train on defendant's railway, or permitting, or allowing any such train to be run over said road, or to be at all contracted for as by plaintiff alleged, or at all.

8.

Error of the Court in permitting plaintiff's witness, *Miss Mitchell* to testify against defendant's objection, to matter in chief, by way of rebuttal, to an alleged statement made by *W. H. O'Neil* to said witness on the train between *Amedee* and *Doyle*, to-wit, that if *Burrus* should inquire what was done at *Amedee*, to tell him that the engine took oil there.

9.

Error of the Court in denying defendant's motion for a non-suit at the close of all the testimony.

10.

Error of the Court in giving to the jury plaintiff's instructions, numbered One, Two, and Three.

301-306

11.

Error of the Court in refusing to give to the jury defendant's instructions Numbered four, seven, eight, and ten.

12.

Error of the Court in refusing to give to the jury the special questions offered by defendant, and to request the jury to make answer to the same.

13.

That the damages are excessive, and appear to have been given under the influence of passion, or prejudice.

14.

That the evidence is insufficient to justify the verdict, and the same is against the law.

15.

Errors in law occurring at the trial, and excepted to by the defendant.

16.

Error of the Court in refusing to grant defendant a new trial, upon the grounds, and for the reasons set forth in its notice of intention to move for a new trial (excepting the third) and for the further reasons and grounds set forth in its memorandum of errors therewith.

JAMES GLYNN,
Attorney for Appellant.

Filed this 4th day of June, 1912. W. A. Fogg, Clerk, by S. R. Tippet, Deputy.

307 In the Supreme Court of the State of Nevada.

No. 2031.

JOSEPH BURRUS, Respondent,
vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Appellant.

James Glynn, Attorney for Appellant.

Mack, Green, Brown & Heer, Attorneys for Respondent.

Opinion.

By the Court, TALBOT, C. J.:

This action was brought to recover damages in the sum of \$20,000.00 for the breach of a contract to furnish a special train. From the verdict and judgment in favor of the plaintiff for \$10,000.00, and from an order denying motion for a new trial, this appeal is taken by the company.

Defendant operates a railroad from Reno in this State to Doyle and Amedee in California.

On the evening of January 21, 1911, the plaintiff was informed that his son, who had been caught in a storm and frozen, was suffering from blood poisoning, near Doyle, and it was necessary that he be removed speedily to Reno for medical treatment and that death would likely result if such removal and treatment were delayed.

Under the allegations and evidence of plaintiff it appears that the plaintiff contracted with the appellant, for the consideration of \$125.00 which he paid in advance, for a special train to leave Reno at six o'clock the next morning and to take him to Doyle and return immediately to Reno with him and his son.

308 According to the testimony of the plaintiff, at the time of the agreement for the special train, the plaintiff informed the appellant that he wished to bring his son to Reno for medical attention, of the location and serious illness of his son, and the necessity for his speedy removal to Reno for treatment, and the danger to the life of his son for delaying such removal.

The train was not started at six o'clock as agreed, but about twenty minutes later. Instead of being held in readiness and returning immediately with the plaintiff and his son to Reno, after its arrival at Doyle it was represented to plaintiff by defendant that it was necessary to run the train to Amedee, 20 miles further, for the purpose of procuring fuel oil for the return trip. Plaintiff believed and relied upon this representation, and was not aware until later that it was not necessary to go to Amedee for fuel oil, and that none was taken on there. In going to Amedee and returning the train was gone for about two hours. No oil was obtained at Amedee, and it was not necessary to obtain any upon the whole trip. At Amedee the defendant took on the train a number of passengers for Reno and collected from them the usual fare. The train was further delayed upon the return to Doyle by attaching to it a freight car loaded with cattle.

By reason of the trip to Amedee and the impeding of the train with the cattle car, it is claimed that the train was delayed for more than three hours in reaching Reno.

It is alleged that the running of the train to Amedee, the misrepresentations as to the reasons therefor, and the taking on of the passengers and the car of cattle, and the delay consequent, were willful and malicious, and that by reason of such wanton, wrongful and negligent acts the plaintiff was caused to suffer much anxiety and great mental pain and anguish. Damages were claimed by reason of the premises and of the wrongful, wanton, willful and negligent acts of the defendant.

The appellant contends that as recovery if sought for the breach of an interstate contract and for damages for mental suffering, the case is one primarily and exclusively within the jurisdiction of the Interstate Commerce Commission to make proper findings and preparations before any action could be maintained, and that the district court was without jurisdiction

309 We are cited to Tex. & Pac. Ry. vs. Abilene Cotton Oil Co., 204

U. S. 426, and other cases holding that a shipper can not maintain an action at common law in the State court for excessive freight rates exacted on interstate shipments where the rates charged were those duly fixed by the carrier according to the act and had not been found by the interstate commerce commission to be unreasonable.

If it be conceded that the interstate commerce commission has exclusive original jurisdiction to determine the unreasonableness of interstate rates, it should be remembered that this is a different kind of a case and one to recover damages for the failure of the appellant to properly run a special train as agreed. If the amount of damages, or the unreasonableness of rates, or whether charges are according to schedule, must first be determined by the interstate commerce commission before suit on the various causes for damages, or torts, or breach of contracts of interstate carriers could be maintained, great would be the burdens of the commission and long, troublesome and expensive the delays which would result to litigants.

There is an assignment that the court erred in its refusal to allow the defendant to amend the answer by setting up its failure to comply with the requirements of the interstate commerce act in the establishment of rates for special trains, or to plead the illegality of its contract by reason of its failure to comply with the law.

The original complaint was filed on April 3, 1911, and after demurrer was sustained the amended complaint was filed on June 24, 1911, to which a demurrer was filed on July 3, which demurrer was argued and overruled on August 16. It did not specify the point covered by the proposed amendment. On November 3, 1911, appellant obtained an order further extending its time to answer until November 13. On November 8 defendant filed a motion to strike out certain portions of the amended complaint; this motion was heard and denied on the following day. On November 13, more than eight months after the filing of the complaint and more
310 than six months after the filing of the amended complaint, defendant filed its amended answer, upon which the cause was heard.

Two days after the beginning of the trial on November 20, and after the jury had been impanelled, defendant objected to the taking of testimony on the grounds that the complaint was insufficient because it did not show compliance by the defendant with the interstate act. The objection was overruled and no effort was made to amend the answer until after evidence had been heard during that day and part of the next, when defendant, without notice, applied to the court for leave to file an amendment to its answer. Later and after the defendant had introduced testimony and upon the following morning, motion for leave to amend the answer was renewed upon the affidavit of the defendant's attorney. This motion was overruled. As often held and as usual in general practice amendments should be liberally allowed, but it is not every character of amendment which should be allowed after months of dilatory tactics and after the trial has progressed. Different courts have held that an amendment will not be permitted to an answer at any stage of the proceedings for the purpose of setting up such an unconscion-

able defense as the statute of limitations. The court properly refused to allow such a character of an amendment after so long a delay and because it sought to set up the appellant's own wrong by failing to comply with the law in matters not strictly germane to the cause of action or justifying the appellant in afflicting suffering and damage upon the plaintiff. Without the amendment there is no allegation or proof and no presumption that the appellant failed to comply with the law in having its rates for special train fixed and published, if any such failure and non-compliance with the law could be deemed a defense which would relieve the appellant from the payment of the damages occasioned by its failure to properly run the special train. If charging more or less than published or approved rates, common carriers may be relieved from their wrongful acts, the public might have little protection.

311 It is urged that no recovery may be had for mental anguish aside from physical suffering. Many of the cases, and especially the older ones, so hold. Some of these decisions have already been reversed, and the tendency of modern authority is to allow damages for mental anguish where it is clearly within the terms of the contract or transaction and the knowledge of and negligently caused by the defendant. (*Western Union Tel. Co. v. Crocker*, 135 Ala. 492; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; *McCoy v. Milwaukee St. Re. Co.*, 8 Wis. 56; *Kelley v. Kelley*, 8 Ind. App. 606; *Willis v. Western Union*, 69 S. Car. 531, 2 Ann. Cases 52 and note p. 55 and cases cited; Regarding freight; *Engle v. Simmons*, 148 Ala. 92, 12 Ann. Cases 140 and note.)

This court has already put itself in accord with this modern and better doctrine in *Barnes v. Western Union*, 24 Nev. 125, which case has been considered favorably and followed by courts in other states. The defendant here, as well as all common carriers, dependent upon the right of eminent domain, its franchise, and the people of the community for its support, owes a duty to the public and its patrons, in addition to the moral obligation upon it and all honest men, to make due effort to keep the terms of its contract.

Aside from any question of mental suffering, the plaintiff was entitled to the proper service of the special train for which he paid. Under *Forrester v. Southern Pacific Co.*, 36 Nev. 247, and cases there cited, the company is liable for punitive damages.

If unaware of the ethics which should guide men in business transactions or unwilling to honestly observe its agreement for which it had collected a due consideration, it should be enlightened by being required to pay the damages incurred by the flagrant and intentional breach of the plain terms of its contract made under misrepresentation, and not allowed to thwart justice on the claim that it was guilty of a crime because it had not filed schedules required by the law—a matter over which plaintiff had no control. It must be assumed that, aside from the false pretense that the train had to go to Amadee for fuel oil, the company was well aware that when a father paid for a special train in an effort to save the life of his son he was entitled to something more than an accommodation cattle train. It was the duty of the company

to send a regular train to care for its regular passengers and cattle shipments if the special train was able to cover the road.

Recovery for mental suffering should be limited to special cases, and punitive damages should be awarded only where the defendant is unduly negligent or the acts are unnecessarily aggravated. Exemplary damages may be allowed for refusing to set off baggage at a station to which a ticket has been purchased. (*Webb v. R. Co.*, 76 S. Car. 193, 11 Ann. Cases 834 and note p. 837.)

The company was fully informed regarding the serious condition of the plaintiff's son, the necessity that he be speedily brought to Reno for medical treatment in order to save his life, and consequently of the great anxiety which would result to a fond parent who had paid for a special train in order to save his son. There is no excuse, legally or morally, for the willful, flagrant and deceptive breach by the appellant of the contract for the special train.

Many cases appear in the books where common carriers have been held liable for failure to furnish transportation in accordance with ordinary tickets and a railroad company should be likewise liable for a failure to comply with its contract for a special train. In reviewing many decisions in the *Forrester* case, we said:

"In the case of *Morrison v. The John L. Stevens*, 17 Fed. Cas. 838, the libellant Morrison paid for passage and the exclusive use of a stateroom for himself and for his wife, who was an invalid, from New York to San Francisco. Relying on the waybill, which was different from the ticket Morrison had secured, the agent at Panama attempted to place a male passenger in the stateroom with Morrison and his wife. Morrison objected, and pleaded for the exclusive use of the room for himself and wife, but she was given a berth in a stateroom with two other females from Panama to San Francisco, and he was deprived of having the exclusive company of his wife. Damages in the sum of \$2,500 were awarded."

However, considered as compensation for mental anguish for the plaintiff under the peculiar circumstances of this case, or as punitive damages, either of which theories would support the verdict against appellant, we regard the amount as awarded to be excessive in consideration of the delay of about three hours occasioned by the breach

of a contract for a trip which necessarily occupied nearly
1313 three times as many hours. If several thousand dollars an hour were not held to be excessive and the train had been long delayed, it might take the little railroad to satisfy a judgment in favor of the plaintiff.

We have examined other assignments upon which so much reliance does not appear to be placed, and we find no error in the record aside from this.

If within ten days the plaintiff files in this court his consent that the judgment be modified so as to reduce the amount allowed him for damages to \$5,000.00, an order will be made that the judgment stand as so modified; otherwise the district court will be directed to grant a new trial.

TALBOT, C. J.

We concur:

NORCROSS, J.

McCARRAN, J.

Filed January 2, 1915. Joe Josephs, Clerk, by H. C. Mighels, Deputy.

314 Endorsed: No. 2031. Joseph Burrus, Respondent, vs. Nevada-California-Oregon Railway, a corporation, Appellant. Opinion by Talbot, C. J. Concurred in by Norcross, J., and McCarran, J. Filed January 2nd, 1915. Joe Josephs, Clerk, by H. R. Mighels, Deputy.

315 In the Supreme Court of the State of Nevada.

No. 2031.

JOSEPH BURRUS, Plaintiff and Respondent,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant and Appellant.

Mack, Green, Brown & Heer, Attorneys for Respondent.
James Glynn, Esq., Attorney for Appellant.

Appealed from the Second Judicial District Court in and for the County of Washoe, State of Nevada.

Judgment.

The above entitled cause came on regularly to be heard on the 6th day of March, 1913, it being a day of the regular term of Court of the January term of the year above named. Messrs. Mack, Green and A. A. Heer, counsel for the Respondent and James Glynn, Esq., counsel for the Appellant, all being in Court were each duly heard in oral argument on the merits of the case for their respective parties, when the cause was submitted to the Court for their consideration and decision. Now on this day all and singular, the law and the premises having been seen, heard and duly considered, and the Court being fully advised in the law, files with the Clerk of this Court their opinion in writing by Talbot, C. J., concurred in by Norcross, J. and McCarran, J., Plaintiff-respondent and against the defendant-appellant.

316 Wherefore it is ordered, adjudged and decreed, that the trial Court properly refused to allow defendant to amend its amended answer so as to show that the contract made, was made in violation of that certain Act of Congress of the United States entitled: "An Act to Regulate Commerce," approved February 4th, 1887, and Acts amendatory thereof, and supplemental thereto, (commonly known as the "Inter State Commerce Act.") Said defense being an unconscionable defense.

And further it is ordered, adjudged and decreed:

"That if within ten days the Plaintiff files with this Court his consent that the judgment be modified so as to reduce the amount

allowed him for damages to \$5,000.00 an order will be made that the judgment stand as so modified; otherwise the District Court will be directed to grant a new trial; and that the District Court of the Second Judicial District, in and for the County of Washoe, State of Nevada, await the determination of the action of the Plaintiff in the above order."

Judgment entered this 2nd day of January, A. D. 1915.

JOE JOSEPHS, *Clerk*,

By H. R. MIGHELS, *Deputy*.

317 In the Supreme Court of the State of Nevada.

Order Denying Rehearing.

JOSEPH BURRUS, Respondent,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Appellant.

Appealed from the Second Judicial District Court in and for the County of Washoe, State of Nevada.

L. N. French, Judge.

Mack, Green, Brown & Heer, Attorneys for Respondent.

James Glynn, Esq., Attorney for Appellant.

Order of the Court.

A decision having been rendered in the above entitled cause on the 2nd day of January, A. D. 1915, by this Court, counsel for Appellant within the time allowed by law filed a petition for rehearing, with Respondent replying thereto.

Now on this day all and singular and the law and the premises having been seen, heard and fully considered, the opinion of the Court is delivered from the Bench by Norcross, C. J. concurred in by McCarran, J., (Coleman J., not having participated in the original hearing and decision did not participate in the order), to the effect that the petition for rehearing be denied.

Whereupon it is now ordered, adjudged and decreed by the Court that the petition for rehearing be and the same is hereby denied.

Order rendered and entered May 1st, 1915.

Attest:

H. R. MIGHELS, *Clerk*.

318-338 In the Supreme Court of the State of Nevada.

No. 2031.

JOSEPH BURRUS, Plaintiff and Respondent,
vs.

NEVADA-CALIFORNIA-OREGON RAILWAY COMPANY, a Corporation, Defendant and Appellant.

The Plaintiff and Respondent in the above entitled action hereby consent that the judgment of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, rendered and entered in said action, be modified so as to reduce the amount allowed by said judgment to plaintiff for damages to the sum of \$5,000.00 so that said judgment shall be for \$5,000.00 with interest thereon at the rate of seven per cent per annum from the date of the entry of said judgment until paid, together with the costs taxed and entered in said judgment.

Dated this 8th day of January, 1915.

JOSEPH BURRUS,
Plaintiff and Respondent.

MACK, GREEN, BROWN
& HERR,

Attorneys for Plaintiff and Respondent.

Filed this 12th day of January, 1915. Joe Josephs, Clerk, by
H. R. Mighels, Deputy.

339 In the Supreme Court of the United States.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Plaintiff in
Error,

vs.

JOSEPH BURRUS, Defendant in Error.

*Assignments of Error to be Relied Upon in the Supreme Court of
the United States.*

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Nevada erred to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the rights of the plaintiff in error as follows:

1. The Supreme Court of the State of Nevada erred in holding that the defense of violation of the Interstate Commerce Act was not sufficiently presented to the trial court by the proposed amendment offered by plaintiff in error to its amended answer so as to form an issue in the case.

2. The Supreme Court of the State of Nevada erred in holding

that the defense of violation of the Interstate Commerce Act was not an issue in the case.

3. The Supreme Court of the State of Nevada erred in holding that the proposed defense of violation of the Interstate Commerce Act was an unconscionable defense.

4. The Supreme Court of the State of Nevada erred in upholding the action of the trial court in its refusal to allow the proposed amendment to its amended answer, setting up a violation of the Interstate Commerce Act in the making of the contract between plaintiff in error and defendant in error alleged to have been
340 breached by the plaintiff in error.

Wherefore, plaintiff in error prays that the judgment herein may be reversed and the case remanded to the Supreme Court of the State of Nevada, with directions to reverse said judgment, and that a new trial be had in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, with leave to plaintiff in error to amend its answer in said court, and for such other proceedings herein as to this Honorable Court shall seem meet and proper.

Respectfully submitted,

GEORGE A. BARTLETT,
Attorney for Plaintiff in Error.

Due service and receipt of a copy of the within and foregoing is hereby admitted this 12th day of October, 1915.

SARDIS SUMMERFIELD,
Attorney for Defendant in Error.

341 [Endorsed:] In the Supreme Court of the United States.
Nevada-California-Oregon Ry., a Corporation, plaintiff in
Error, vs. Joseph Burrus, Defendant in Error. Assignments of
Error, to be Relied Upon in the Supreme Court of the United States.
George Bartlett, Attorney for Plaintiff in Error.

342 In the Supreme Court of the United States.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Plaintiff in
Error,

vs.

JOSEPH BURRUS, Defendant in Error.

Pursuant to Subdivision 9 of Rule 10, of the above-entitled court, the clerk of said court will please cause to be printed the following parts of the record:

Amended Complaint (Folios 592-614);

Answer to Amended Complaint (Folios 670-697);

Part of the first day's proceedings in the trial court, November 22, 1911 (Folios 8-14);

Part of the second day's proceedings in the trial court, November 23, 1911 (Folios 17-18);

Part of the third day's proceedings in the trial court, November 24, 1911 (Folios 57-68) (700-703) (710-717);

Part of the fourth day's proceedings in the trial court, November 25, 1911, (Folios 347-355) (717-726);

Direct examination of witness H. B. McNamara (Folios 439-440);

Verdict of Jury, November 25, 1911 (Folios 745-748);

Judgment on Verdict (Folios 778-781);

Notice of Intention to Move for a New Trial (Folios 803-806);

Errors to be Relied Upon on Motion for New Trial (Folios 809-811) (813-814); 819;

343 Decision on Motion for a New Trial (Folios 823-825);

Specification of Errors of the Trial Court, upon which appellant (Plaintiff in Error) relied in the Supreme Court of the State of Nevada (Folios 833-840);

Opinion of Supreme Court of Nevada (Folios 851-870);

Judgment of Supreme Court of Nevada (Folios 871-874);

Consent of Plaintiff-Respondent to Reduction of Judgment to Five Thousand Dollars (Folios 875-876);

Order of Supreme Court of Nevada denying Petition for Rehearing (Folios 877-879).

GEORGE A. BARTLETT,

Attorney for Plaintiff in Error.

Due service and receipt of a copy of the foregoing is hereby admitted this 12th day of October, 1915.

SARDIS SUMMERFIELD,

Attorney for Defendant in Error.

344 [Endorsed:] 622/24.905. In the Supreme Court of the United States. Nevada-California-Oregon Ry., a Corporation, Plaintiff in Error, vs. Joseph Burrus, Defendant in Error. Portion of the Record to be Printed. George Bartlett, Attorney for Plaintiff in Error.

345 [Endorsed:] File No. 24905. Supreme Court U. S., October term, 1915. Term No. 622. Nevada-California-Oregon Railway, Pl'ff in Error, vs. Joseph Burrus. Statement of errors to be relied upon and designated by plaintiff in error of parts of record to be printed, with proof of service of same. Filed October 19, 1915.

Endorsed on cover: File No. 24905. Nevada Supreme Court. Term No. 622. Nevada-California-Oregon Railway, plaintiff in error, vs. Joseph Burrus. Filed September 8, 1915. File No. 24905.



* * * * *

Mr. Glynn: If the Court please, in view of the ruling of the Court on the other question, I would like permission of the Court to file an amended answer setting up the lack of a published tariff. It slipped my mind. Of course, we are presumed to know the law, but I didn't know about this question at the time the answer was filed and only have been lately in this case I think I am entitled to file this amended answer so that the question may be set up in the answer, the ruling of the Interstate Commerce Commission. (Reads) Which is verified by Mr. O'Neill. Now, under the circumstances, of course, I would like that this should be filed as an amendment to the answer.

The Court: Have you noticed it and filed your affidavit?

Mr. Glynn: There has been no affidavit; I have made no affidavit; I could not make any affidavit under the circumstances. I rely on the Court. It didn't come to my attention, I didn't discover it until after the answer was filed and we had entered on the selection of the jury, and in fact until the question was raised here, very shortly before we, before that. That is all that I can allege and swear to it. Of course, I can do that. But, it is right before counsel produced evidence, that I make this offer at the present time. I have made it at the earliest moment in view of all the circumstances defendant simply made the issue, and I can argue from defendant's view point on this side of the case.

Mr. Brown: Plaintiff objects to the granting of leave that the defendant amend his answer as proposed, first, upon the ground that there has been no affidavit showing good cause therefor, or any notice to the adverse party of this application, basing our objection on Section 3163 of the Compiled Laws.

We further object upon the ground that the proposed amendment does not constitute any defense as to the facts constituting the offense, in the law or in practice, the facts stated are wholly irrelevant and immaterial; and upon the further ground that an amendment at this time of the character proposed comes too late. That the defense is unconscionable—contrary to good morals—that the defendant should be permitted to set up, at this time, at the trial, by way of amendment to his answer, his own failure to comply with the law as a defense to the wrongful acts alleged in the complaint, it appearing from the record and files here that this case has been pending for some time; that weeks after the original answer was filed an amended answer was filed through the counsel now of the defendant, and that to permit a technical defense to this case at this time would not be in furtherance to justice. It seems to me it is hardly the time to argue the objection. I want to get somewhere with this witness.

Mr. Green: I wish to add to Judge Brown's objection that the pretended defense offered by the amendment is entirely a new defense, involves entirely new issues sought to be injected at the trial of this case, the proofs of which cannot be obtained by the plaintiff

in this case, and that the offered amendment is not made in furtherance of justice, as required by Section 68 of the Civil Practice act. (Argument.)

The Court: I view the objection good, in the lack of notice and affidavit to base your motion to amend upon, and upon that ground the objection will be sustained, and the motion to amend at this time will be denied.

Mr. Glynn: I wish the stenographer to note that I now tender the amended answer for filing, in words and figures as follows: In your notes you will leave a place where you can set it out as I have read it. (Reads:)

"In the Second Judicial District Court of the State of Nevada in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Amendment.

The defendant, by leave of Court first obtained, further answers plaintiff's complaint alleges:

That the alleged agreement set forth in plaintiff's complaint was and is null and void in this: that at the time plaintiff alleged said contract was made and entered into, there was no tariff rate fixed, made, filed, or published, by the defendant, or authorized or approved by the Interstate Commerce Commission, as by law provided, or at all; nor was there any tariff rate of defendant in existence governing, or regulating, or permitting the hiring, using, running or contracting for a special train to be run over defendant's road for the exclusive, or other use of plaintiff, or other persons whatsoever, or for any special purpose, or at any special rate, or at all, nor for the carrying, or transporting of plaintiff, or any other person or persons, at any special or any rate whatever, between any points on defendant's road; that plaintiff's alleged agreement was and is null and void and in violation of that certain Act of Congress of the United States, entitled, "An Act to Regulate Commerce," (commonly known as the "Interstate Commerce Act"), approved February 4th, 1887, and Acts amendatory thereof, and supplemental thereto.

JAMES GLYNN,
Attorney for Defendant."

We except to the ruling of the Court on the ground that it is an abuse of discretion on the part of the Court for refusing to allow it to be filed. I would ask the Clerk to mark that: "Tendered for filing" at this time. (Hands paper to Clerk).

* * * * *

In the Second Judicial — Court of the State of Nevada in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY COMPANY, a Corporation,
Defendant.

Notice of Motion and Motion.

To the plaintiff above named and to Mack, Green, Brown & Heer, Esqs., his attorneys:

You will take notice that on the 29th day of November, 1911, at the hour of ten o'clock a. m. at the Court Room of the above entitled Court the defendant will move the Court for an order permitting him to file an Amendment to the defendant's Amended Answer herein, a copy of which is hereto attached, together with an affidavit of James Glynn upon which affidavit said motion is based.

Upon the above notice the defendant moves the Court for permission to file the proposed Amendment to the Amended Answer herein, which said notice is by reference made part hereof.

Reno, Nevada, November 24th, 1911.

JAMES GLYNN,
Attorney for Defendant.

Good cause appearing therefor the time for hearing the above motion is hereby shortened to, and will be heard at the hour of 10:00 P. M. o'clock on November 25th, 1911, at the Court Room of the above entitled Court.

L. N. FRENCH, *Judge.*

Endorsed: No. 7939. In the Second Judicial District Court of the State of Nevada, in and for Washoe County. Joseph Burrus, plaintiff, vs. Nevada-California-Oregon Railway, a corporation. Defendant. Notice of Motion, Motion, Order Shortening Time. James Glynn, Attorney for Defendant.

In the Second Judicial District Court of the State of Nevada in and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY COMPANY, a Corporation,
Defendant.

Affidavit.

James Glynn, being duly sworn, says: That he was substituted as sole attorney for the defendant in the above entitled cause on

the 30th day of October, 1911; and that from said date until the date hereof the time has been wholly insufficient to fully look into the facts of the case and the legal aspect thereof; that at the time of the Amended Answer herein was filed by affiant he was wholly unaware of the matters contained in the proposed amendment to the Amended Answer herewith submitted; that since his appointment as such attorney affiant has used due diligence and has been active both day and night in endeavoring to ascertain the facts and all thereof concerning this cause and the law applicable thereto; that it was not until after the 20th day of November, 1911, and after the jury was called in this case that affiant became aware of the facts stated in said proposed Amendment to the Amended Answer, concerning the filing and publishing of tariff rates as required by the so-called Interstate Commerce Acts; that the failure to include the defense contained in said proposed amendment to the Amended Answer, in said amended Answer, is excusable neglect due to insufficient time, and affiant verily believes that the matters contained in said proposed Amendment constitute a full and complete defense to plaintiff's alleged cause of action; that affiant makes this application in good faith.

JAMES GLYNN.

Subscribed and sworn to before me this 24th day of November, A. D. 1911.

[SEAL.]

FRANK J. BYINGTON,
Notary Public.

* * * * *

In the Second Judicial District Court of the State of Nevada in
and for Washoe County.

JOSEPH BURRUS, Plaintiff,

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corporation, Defendant.

Amendment to Answer.

The defendant by leave of Court first obtained, further answering plaintiff's complaint alleges:

That the alleged agreement set forth in plaintiff's complaint was and is null and void, in this: that at the time plaintiff alleges said contract was made and entered into, there was no tariff rate fixed, made, filed, or published, by the defendant, or authorized or approved by the Interstate Commerce Commission, as by law provided, or at all; nor was there any tariff rate of defendant in existence governing, or regulating, or permitting the hiring, using, running or contracting for a special train to be run over defendant's road for the exclusive, or other use of plaintiff, or for any special purpose, or at any special rate, or at all, nor for the carrying, or transporting of plaintiff, or any other person, or persons, at any

special, or other rate whatever, between any points on defendant's said road; that plaintiff's alleged agreement was, and is, null and void, and in violation of that certain act of the Congress of the United States, entitled the "Act to Regulate Commerce" (commonly known as the "Interstate Commerce Act") approved February 4th, 1887, and acts amendatory thereof and supplemental thereto.

JAMES GLYNN,
Attorney for Defendant.

STATE OF NEVADA,
County of Washoe, ss:

W. H. O'Neil, being duly sworn, deposes and says: That he is the assistant traffic manager of the Nevada-California-Oregon Railway, defendant in the foregoing action, and as such makes this verification for and on behalf of said def't; that he has read the foregoing amendment to answer in the above entitled action; and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters that he believes it to be true.

W. H. O'NEIL.

Subscribed and sworn to before me this 24th day of November, 1911.

[SEAL.]

FRANK J. BYINGTON,
Notary Public.

Endorsed: No. 7939, Orig. In the 2nd Judicial District Court of the State of Nevada, in and for Washoe County. Joseph Burrus, vs. Nevada-California-Oregon Ry. Co. Proposed Amendment to Answer. Tendered for filing this 25th day of Nov. 1911. W. A. Fogg, Clerk, by F. K. Unsworth, Deputy. James Glynn, Attorney for Defendant.

In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

SATURDAY, November 25, 1911—10:00 o'clock a. m.

Present: Hon. L. N. French, Judge; C. P. Ferrel, Sheriff; W. A. Fogg, Clerk.

JOSEPH BURRUS

vs.

NEVADA-CALIFORNIA-OREGON RAILWAY, a Corp.

This being the time to which the above-entitled action was continued, the Plaintiff and his Attorneys, Mack, Green, Brown & Heer and the Defendant by its Attorney, James Glynn, Esq., being present in Court, the roll of Jurors was called and all answered to their names.

Defendant moved to file the Amendment to the Amended Answer and read the Affidavit of Defendant's Counsel in support of the Motion.

Plaintiff objected to the Motion on the grounds set forth in the reporter's notes. The matter was argued by the counsel for the respective parties and the Court, being fully advised in the premises, ordered Defendant's Motion denied.

* * * * *





JUL 12 1916

JAMES D. MAHER

CLERK

IN THE

**Supreme Court of the
United States**

OCTOBER TERM, 1915

No. [REDACTED] 237.

NEVADA-CALIFORNIA-OREGON
RAILWAY,

Plaintiff in Error,

vs.

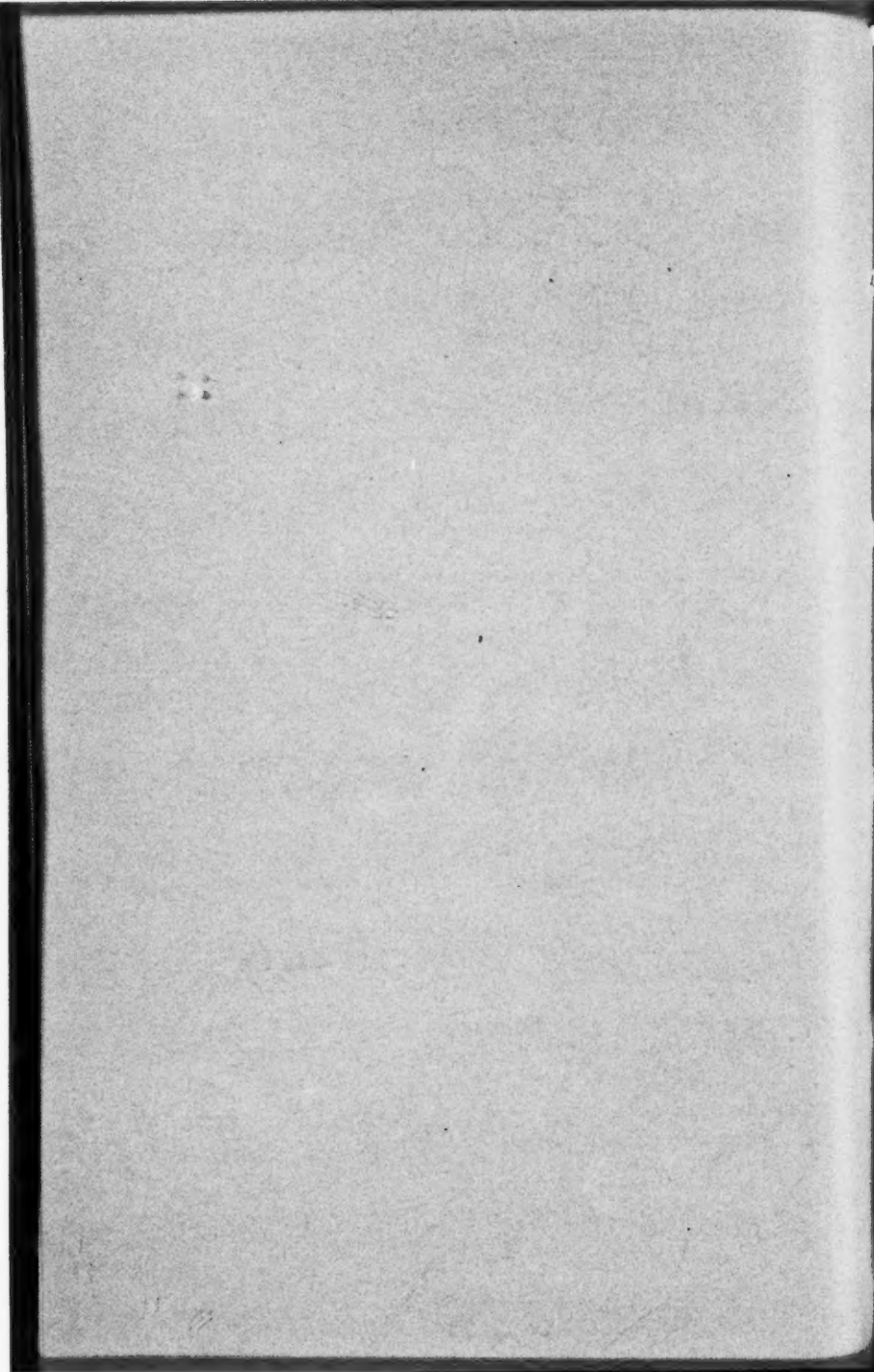
JOSEPH BURRUS,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE SUPREME COURT OF THE
STATE OF NEVADA

JAMES GLYNN,
Attorney for Plaintiff in Error.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1915

No. 622

NEVADA-CALIFORNIA-OREGON
RAILWAY,

Plaintiff in Error,

vs.

JOSEPH BURRUS,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE SUPREME COURT OF THE
STATE OF NEVADA

STATEMENT

Plaintiff Joseph Burrus, now defendant in error, pleaded a special agreement with defendant to convey plaintiff by special train from the city of Reno in the State of Nevada to the town of Doyle in the State of California, and to return with plaintiff and plaintiff's son from said Doyle to Reno without delay, for which service plaintiff agreed to, and did pay defendant, the sum of one hundred and twenty-five dollars (\$125).

That the reason why plaintiff engaged such train was that he wanted to bring his son from Doyle to Reno to receive medical attention, which fact was made known to Appellant at the time said agreement was made.

That defendant carried plaintiff to Doyle where plaintiff left the train and proceeded to a farm house about a mile distant where his son then was; that the defendant instead of running said train as a special train for plaintiff's sole use and benefit and returning the same from Doyle with plaintiff and his son without delay, did run said train as an accommodation train by going twenty miles beyond Doyle to the town of Amadee, in the State of California, and there took on some passengers, thence returning to Doyle and there took on plaintiff and his son, and from thence to Reno.

That by reason of the train going to Amadee and the taking on of such passengers and the taking on of a car of cattle at Doyle, plaintiff's return to Reno was delayed for over two hours, during which time it was alleged he endured mental suffering for which damage is claimed. No claim is made that plaintiff suffered any physical injury or endured any physical suffering.

Damages were claimed by plaintiff for mental suffering only in the gross sum of twenty thousand dollars (\$20,000).

The jury returned a verdict for plaintiff in the sum of ten thousand dollars (\$10,000), which was reduced by the supreme court of the State of Nevada to five thousand dollars (\$5,000).

After jury was inpanelled and sworn and on the 22nd day of November, 1911, defendant objected to the introduction of any testimony by the plaintiff on the ground that the contract alleged to have been breached

was illegal in this: That it appeared from the complaint that it was an interstate contract and that no tariff schedule existed at the time it was made providing for the running of special trains for any special purpose, and that the complaint should contain an allegation of authority to make such an agreement.

See pages 1 and 2, folios 3 and 4 of printed transcript.

Objection was argued during the entire day and on the next day, November 23, 1911, overruled by the court.

See bottom of page 2 printed transcript.

On the 24th of November, 1911, defendant moved to file an amendment to the answer, setting up a lack of provision in the tariff schedule providing for the running of a special train, at a special rate, or for any special purpose or at all, tendering the same to the clerk for filing, which was objected to by plaintiff and the objection was sustained by the court.

See page 14, folio 239, printed transcript.

The proceedings had in court at that time and the amendment tendered being set forth on pages 38 and 39 of printed transcript, plaintiff's objection being sustained upon the ground of want of notice and affidavit in support of the amendment.

On the same day, November 24, 1911, defendant served notice on opposing counsel that it would move the court for an order permitting the filing of an

amendment to the defendant's amended answer which amendment was verified by W. H. O'Neil, assistant traffic manager of said defendant, and was supported by the affidavit of James Glynn, counsel for defendant. Said motion was heard the next day, November 25, 1911, said proceedings and amendment being set forth on pages 40, 41 and 42 of printed transcript, which motion was denied by the court (page 43 printed transcript).

All of the foregoing rulings by the trial court were sustained by the supreme court of the State of Nevada in its opinion. Supreme court also holding that the defense tendered by the amendment was an unconscionable defense, and judgment entered accordingly, and later a petition for re-hearing was denied by said supreme court.

After plaintiff had rested his case, defendant offered to prove by its traffic manager, Herbert B. McNamara, that on the day said contract was alleged to have been made, that there was no tariff rate in existence covering the hiring of a special train or the price to be collected or charged for the transportation of any person or persons on any such special train over defendant's road. Objection to his testimony was made by plaintiff, which was sustained by the court.

See page 3, folios 147 and 148, printed transcript.

ASSIGNMENTS OF ERROR TO BE RELIED UPON

1. The Supreme Court of Nevada erred in holding that the defense of violation of the Inter-state Com-

merce Act was not sufficiently presented to the court by the proposed amendment, offered by plaintiff in error to its amended answer so as to form an issue in the case.

2. The Supreme Court of Nevada erred in holding that the defense of violation of the Inter-state Commerce Act was not an issue in the case.

3. The Supreme Court of Nevada erred in holding that the proposed defense of violation of the Inter-state Commerce Act was an unconscionable defense.

TO SHOW THE ILLEGALITY OF A CONTRACT
SUED UPON OR TO RECOVER DAMAGES
FOR ITS BREACH IT IS NOT ABSOLUTELY
NECESSARY THAT SUCH ILLEGALITY BE
PLEADED.

In the case of *Oscanyan vs. Winchester Repeating Arms Co.*, 103 U. S. 261; book 26, L. Ed. page 542, the court said:

“The position of the plaintiff, that the illegality of the contract in suit cannot be noticed because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel.

The theory upon which the action proceeds is that the plaintiff has a contract, valid in law for certain services. Whatever shows the invalidity of the contract shows that in fact no such contract as alleged ever existed.”

And again:

"Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality, *and public policy*. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. *It was one which the court itself was bound to raise in the interest of the due administration of justice.*"

And again, quoting from Mr. Justice Swain in another case:

Hall vs. Coppel, 7 Wall, 542-558; 19 L. Ed. 244-248.

"In such cases there can be no waiver; the defense is allowed, not for the sake of the defendant but of the law itself.

The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo mala non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. *Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.* No consent of the defendant can neutralize its effect. A stipulation in the most solemn form, to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys.

The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

"No court will consciously aid in enforcing an unlawful contract whether the illegality is or is not pleaded."

Claffin vs. United States, & c, 165 Mass. 501;
52 Am. St. 528; 43 N. E. 293.

"In an action upon a contract which is illegal because violative of a penal statute, it is the duty of the court *sua sponte* to take notice of the illegality, whether pleaded or not."

Heffron vs. Daly, 133 Mich. 613; 95 N. W. 714.

"When a plaintiff seeks to enforce an executory contract, or to recover damages for its breach, if, in the development of his case, it appears that the consideration of the contract involves a violation of a penal law, the courts will declare the contract void, and refuse to aid in its enforcement, *whether its illegality is pleaded or not.*"

Keigh vs. Fountain, 3 Tex. Civ. App. 391; 22 S. W. 191, and cases cited therein.

"Although a contract does not show upon its face that it is violative of a statute upon the same subject, yet, if such is the fact, it is invalid, and a recovery can not be had upon it."

Keith vs. Fountain, *supra*.

"If the direct object of the parties is to do an illegal act, an agreement is void, and it is immaterial that either or both did not know that the object was illegal; for, as a general rule, ignorance of the law is no excuse."

9 Cyc. 569.

“An illegal agreement will not be enforced, and hence is not a contract according to the definition of a contract.”

9 Cyc. 465.

“The illegality of the contract is not set up as a defense nor was it noticed in the Superior Court where the plaintiff had a verdict. But no Court will consciously lend its aid for the enforcement of an illegal contract.”

Clafflin vs. U. S. Credit System Co., 165 Mass. 501; 52 Am. St. 528.

“Where a contract shows on its face that it is in contravention of a statute, the statute need not be pleaded to raise the question of illegality.”
 “Where a party to a contract cannot open his case or sustain some particular defense without showing that he has broken the law, the court will not assist him, even though there is no affirmative defense pleaded to the contract.”

Shoney vs. Quigley etc. R. Co., Vol. 22 A. & E. Ann. Cas. 1143.

It has generally been held that, in an action at law, where the defendant does not set up the defense of the illegality of the contract sued on, but such illegality appears from the case as made by either the plaintiff or the defendant, it becomes the duty of the court *sua sponta* to refuse to entertain the action.

See note to O'Brien vs. Shea, Ann. Cas. 1912 A. Vol. 22, p. 1033. Citing English cases and cases by the U. S. Sup. Court, and decisions of 17 states.

THE AGREEMENT FOR THE RUNNING OF THE SPECIAL TRAIN AT A SPECIAL PRICE AND FOR A SPECIAL PURPOSE IN THE CASE AT BAR, WITHOUT PROVISION BEING MADE THEREFORE IN THE TARIFF SCHEDULE, WAS IN VIOLATION OF SECTION VI. OF THE INTER-STATE COMMERCE ACT.

Said Section VI. being as follows :

“No carrier, unless otherwise provided by this act shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariff.”

Fed. Stat. Ann. Supp. 1909, p. 260.

“Parties to an inter-state contract are presumed to contract with reference to the Acts of Congress on that subject, and such contracts can not be construed with reference to any other law.”

Southern Ry. Co. vs. Harrison, 24 Southern 553, Ala.

“Contracts in violation of inter-state commerce acts, are governed by general rule regarding illegal contracts.”

Southern Ry. vs. Wilcox, 39 S. E. 145, (Va.)

“Any contract or agreement which directly or indirectly violates provisions of Inter-State-Commerce-Act is absolutely void and non-enforceable in the courts.”

Atchison-Topeka & S. Fe vs. Holmes, 90 Pac. 24; and at page 26, “Contracts tainted with illegality are absolutely void.”

“The objection that a contract is immoral, or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake however that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, * * * between him and the plaintiff. If the cause of action appears to arise *ex turpi causa*—or the transgression of a positive law of the country, there the court says he has no right to be assisted. But as the law finds them, so it will leave them.”

McCausland vs. Ralston, 12 Nev. 208,

Approved, 14 Nev. 183;

Drexler vs. Tyrell, 15 Nev. 114.

“The Court permits defendant to set up illegality of the contract, not out of any regard for the

defendant, but on account of the public interest; and that the contract is inter-state, with intrastate, makes no difference."

Continental Wall Paper Co. vs. Louis Voght & Sons, 212 U. S. 227, 53 L. Ed. 486.

Carrier not responsible in damages for failure to perform a contract which is in violation of the Act.

Barnes Inter-state Transportation, Sec. 415; Citing I. C. C. vs. C. & O. Ry. 128 Fed. 59.

Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect; and the test as to whether a demand connected with an illegal transaction, be capable of being enforced at law is, whether the plaintiff requires to rely on such transaction in order to establish his case.

So if a contract be made on several considerations, one of which is illegal, the contract is void, and that whether the illegality be at common law, or by statute."

Chitty on Contracts, 5th Ed. pages 671-672.

"Persons dealing with inter-state carriers are as effectually bound by the inter-state commerce act and the orders of the Commission as to both freight and passenger tariffs as is the carrier himself."

Melody vs. Great Nor. R. Co., 30 L. R. A., N. S. p. 568.

“An advantage accorded by special agreement which affects the value of the service to the shipper and its costs to the carrier, shall be published in the tariffs; and for breach of such a contract relief will be denied because its allowance without such publication is a violation of the Act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.”

Chicago & A. R. Co. vs. Kirby, 225 U. S. 155, 56 L. Ed. 1033, 31 A. & E. Ann. Cas. 1914 A. p. 501 and note.

“Reparation based on breach of contract for a privilege which was not mentioned in the tariffs was denied the shipper because its allowance without publication was in violation of law.”

Barnes on Inter-state Transportation, Sec. 415, citing Shiel & Co. vs. Ill. Cent. R. R. Co., et al, 12 I. C. C. R., 211;

Aaron Sage vs. Geo. Hampe, 235 U. S. 99; 59 L. Ed. 147.

Plaintiff in error, by its objection to the introduction of testimony, called the attention of the court to the fact that the contract pleaded was made in violation of Section 6 of the interstate commerce act, taking the position that the breach alleged not being a breach of any of the general duties imposed by law upon plaintiff in error; but being a breach of a particular special contract, that in view of the provisions of Section 6 of the interstate commerce act, to state a cause of action it was necessary that plaintiff should allege, as a condition precedent, some authority for the making of such contract. Being overruled on

this point plaintiff in error then sought to amend its amended answer, tendering an amendment. Again on the next day, plaintiff in error tendered its verified amendment to the amended answer, showing that there was no provision made for the running of a special train. The contention of plaintiff in error now being that, under the authorities cited, the attention of the court was sufficiently called to the fact that the contract alleged to have been breached, being a contract in interstate commerce, was clearly a contract made in violation of the provisions of said act; and, such being the case, it was the duty of the court to have noticed the same and allowed the amendment upon such terms as the court might impose. Under the doctrine of the Kirby case and the other cases cited, there can be no question that the contract was illegal, and, if the court had taken notice of the proposed amendment, as it should have done, it would have been a complete defense to the action.

Respectfully submitted,

JAMES GLYNN,

Attorney for Plaintiff in Error.



FILED

AUG 3 1916

JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No.  237

NEVADA-CALIFORNIA-OREGON
RAILWAY,

Plaintiff in Error,

vs.

JOSEPH BURRUS,

Defendant in Error.

IN ERROR
to the
SUPREME
COURT
of the
STATE OF
NEVADA

BRIEF FOR DEFENDANT IN ERROR

SARDIS SUMMERFIELD

and

JOHN E. RAKER,

Attorneys for Defendant in Error.

MACK, GREEN, BROWN, and HERR, of Counsel.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

No. 622.

NEVADA-CALIFORNIA-OREGON
RAILWAY,

Plaintiff in Error.

vs.

JOSEPH BURRUS,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE.

In this action it is claimed that the Supreme Court of the State of Nevada committed error in affirming a judgment and order of the District Court of the Second Judicial District of the State of Nevada, in refusing to allow the plaintiff in error to plead and prove an alleged violation of the Interstate Commerce Act as a defense to an action for damages for a breach of the contract in issue.

After the pleadings in the case had been settled by various appropriate proceedings, the cause regularly set for trial on the 20th day of November, 1911, and a jury had been impaneled to try the case, the attorney for the defendant, (plaintiff in error here) on the 22nd day of November, 1911, objected to the introduction of any testimony upon the ground that the complaint failed to show a compliance by the defendant with the Interstate Commerce Act. The Trial Court overruled the objection, holding that a compliance with the Interstate Commerce Act was presumed and an allegation of such compliance in the complaint was unnecessary. Thereupon the case proceeded. (Record pages 1-2-3.)

No offer was made to amend the answer setting up the alleged defense until the 24th day of November, when such an offer was made without any notice to the defendant or affidavit in support of the amendment and after the cause had proceeded to trial, before a jury, and two days had been spent in taking testimony. (Record page 14). Upon an objection by plaintiff to the filing of the amended answer on the ground of want of notice and affidavit in support of the amendments, the objection was sustained and the motion to file the amendment to the answer setting up the alleged defense was denied. On the 25th day of November, 1911, the motion to file an amendment to the answer was renewed. (Record pages 40-41-42). Plaintiff's counsel objected to the filing of the amended answer, upon the ground that it constituted no defense to the action; was not supported by a proper affidavit of merits; sought to interpose a technical and unconscionable defense; that the motion had not been made in seasonable time; and that the alleged defense was not in furtherance of justice.

The Supreme Court of the State of Nevada, in sustaining the Trial Court in so ruling, gives the following resume of the history of the case and its reason for the affirmance of the order and judgment. (*Burrus vs. Nevada-California-Oregon Railway*, 38 Nev. 156-159, 145 Pac. 926).

"There is an assignment that the court erred in its refusal to allow the defendant to amend the answer by setting up its failure to comply with the requirements of the interstate commerce act in the establishment of rates for special trains, or to plead the illegality of its contract by reason of its failure to comply with the law. The original complaint was filed on April 3, 1911, and after demurrer was sustained the amended complaint was filed on June 24, 1911, to which a demurrer was filed on July 3, which demurrer was argued and overruled on August 16. It did not specify the point covered by the proposed amendment. On November 3, 1911, appellant obtained an order further extending its time to answer until November 13. November 8 defendant filed a motion to strike out certain portions of the amended complaint, and this motion was heard and denied on the following day. On November 13, more than eight months after the filing of the complaint and more than six months after the filing of the amended complaint, defendant filed its amended answer, upon which the cause was heard.

Two days after the beginning of the trial on November 20, and after the jury had been impaneled, defendant objected to the taking of the testimony on the grounds that the complaint was insufficient because it did not show compliance by the defendant with the interstate act. The objection was overruled, and no effort was made to amend the answer until after evidence had been heard during that day and part of the next, when

defendant, without notice, applied to the court for leave to file an amendment to its answer.

Later, and after the defendant had introduced testimony and upon the following morning, motion for leave to amend the answer was renewed upon the affidavit of the defendants' attorney. This motion was overruled. As often held and as usual in general practice, amendments should be liberally allowed; but it is not every character of amendment which should be allowed after months of dilatory tactics and after the trial has progressed. Different courts have held that an amendment will not be permitted to an answer at any stage of the proceedings for the purpose of setting up such an unconscionable defense as the statute of limitations. The court properly refused to allow such a character of an amendment after so long a delay and because it sought to set up the appellant's own wrong by failing to comply with the law in matters not strictly germane to the cause of action or justifying the appellant in afflicting suffering and damage upon the plaintiff. Without the amendment there is no allegation or proof and no presumption that the appellant failed to comply with the law in having its rates for special train fixed and published, if any such failure and noncompliance with the law could be deemed a defense which would relieve the appellant from the payment of the damages occasioned by its failure to properly run the special train. If, by charging more or less than scheduled or approved rates, common carriers may be relieved from their wrongful acts, the public might have little protection."

We uncompromisingly dispute that portion of the statement of the attorney for plaintiff in error contained at page 2 of his opening brief, in which he says:

"No claim is made that plaintiff suffered any physical injury or endured any physical suffering."

The complaint alleged and the proofs showed that plaintiff in error was guilty of a wilful, wanton, and tortious breach of contract; that defendant in error was tortiously deprived of his property in the special train; that he suffered personal inconvenience, was exposed to intense cold and endured physical suffering and personal discomfort, as well as great mental anguish; that plaintiff in error had knowledge and notice at the time of making the contract that these injuries would necessarily result from a breach of the contract. Though this Court will not review or determine these issues, the judgment is supported by all of these elements of damage.

POINTS AND AUTHORITIES.

I.

INTERSTATE COMMERCE LAWFUL SUBJECT OF CONTRACT.

Interstate commerce and transportation are lawful objects and subjects of contract. The contract was not *prima facie* illegal, and its illegality was not shown by pleading, proof, or presumption.

In the absence of such showing, the Court must presume that the Interstate Commerce Act has been complied with.

Meeker vs. Lehigh Valley R. R., 162 Federal, 354.
Wabash R. Co. vs. Piddy, 101 N. E., 724.

In the recent case of *Cincinnati, New Orleans & Texas Pacific Railway Company vs. Rankin*, decided May 22, 1916, (36 Supreme Court Reporter, 555-558), this Court says:

"We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the interstate commerce act. It cannot be assumed, merely because the contrary has not been established by proof, than an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and, in respect of transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium.*' *Bank of United States v. Dandridge*, 12 Wheat. 64, 69, 70, 6 L. ed. 552, 554, 555; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 97, 37, L. ed. 93, 95, 13 Sup. Ct. Rep. 267; *Maricopa & P. R. Co. v. Arizona* 156 U. S. 347, 351, 39 L. ed. 447, 449, 15 Sup. Ct. Rep. 391; *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 649, 46 L. ed. 366, 372, 22 Sup. Ct. Rep. 240."

II.

THERE IS NO FEDERAL QUESTION INVOLVED OR PRESENTED BY THE RECORD.

Section 3163 of the compiled laws of Nevada, 1900, (being section 5084 of the Revised Laws of Nevada of 1912) in force at the time of the trial, reads as follows:

"The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may upon like terms enlarge the time for an answer or demurrer, or demurrer to an answer filed. The court may likewise upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may upon like terms allow an answer to be made after the time limited by this Act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The decisions of the highest tribunals of the State of Nevada hold that the Trial Courts have no arbitrary right to allow amendments, unless the terms of the statute are complied with and when the terms of the statute are complied with, the allowance of such are largely within the discretion of the Trial Court.

Howe v. Coldren, 4 Nev., 171.

Conley v. Chedic, 7 Nev., 336.

McCausland v. Ralston, 12 Nev., 195.
28 Am. Reports, 781.

Ewing v. Jennings, 15 Nev., 379.

Marshal v. Golden Fleece G. & S. M. Co., 16 Nev., 157.

Burrus v. N.-C.-O. Ry. Co., 145 Pac., 926.

The rule of absolute discretion in the Trial Court to allow or deny amendments to pleadings is recognized and followed by the Supreme Court of the United States.

Chapman v. Barney, 129 U. S., 677-32 L. ed. 800.
 Walden v. Craig, 9 Wheat. 576-6 L. ed. 164.
 1 Standard Proc., 866-867.

Under section 3141 of Cutting's Compiled Laws, in force at the time of the trial of the case, as well as under the present law of Nevada, an answer must contain a special denial of each material allegation of the complaint, and may contain "a statement of any new matter or counterclaim constituting a defense." Under the laws of the State of Nevada and the decisions of the courts of that State, it was necessary to plead affirmatively the alleged defense.

Maynard v. Johnson, 2 Nev., 16.
 Horton v. Rhuling, 3 Nev., 498.
 Furguson v. Rutherford, 7 Nev., 385.

See also

Wiggin v. Federal S. & G. Co., (Conn.) 59 Atla. 607.
 American Copying Co. v. Muleski, (Mo.) 122 S. W. 384.
 Rabinowitz v. Cunard S. S. Co., 119 N. Y. S., 625.
 Mitchel v. Brenhan, (Mo.) 95 S. W. 939.
 Jefferson v. Burham, 85 Federal, 949.

There was no Federal question involved in the Trial Court or in the Supreme Court of the State of Nevada. The question involved was simply a question of practice and procedure under a statute and rule of practice above quoted. Probably no question of law is better settled than that the construction of a state statute by the highest court of the state in which it is enacted, forms a rule of decision for the Federal Courts of the United States.

The authorities to this effect are so numerous as not to require citation.

- Northern Pacific R. R. Co. v. Meese, 36 Supreme Court, 223.
 Mount Vernon etc. Co. v. Alabama Interstate Power Company, 36 Supreme Court, 234.
 Zuinette v. Pullman, 229 Fed. 333.
 Iowa Portland Cement Co. v. Lamandola, 227 Fed., 823.
 Reinman v. City of Little Rock, 237 U. S., 171; 59 L. ed. 900.
 Price v. People, 238 U. S., 446; 59 L. ed. 1400.
 Willoughby v. City of Chicago, 235 U. S., 45.
 Michigan Central R. Co. v. Michigan R. Co., 236 U. S. 615.
 Louisville & N. R. Co. v. Kentucky R. R. Commission, 214 Fed., 465.
 New York Life Ins. Co. v. Dunlevy, 214 Fed., 1.
 Chicago M. & St. P. Ry. Co. v. The State of Iowa, 233 U. S., 334.
 Thompson v. Sloss-Sheffield Steel & Iron Co., 209 Fed., 840.
 Old Colony Trust Co. v. City of Omaha, 230 U. S., 100; 57 L. ed. 1410.
 Schmidinger v. City of Chicago, 226 U. S., 578; 57 L. ed. 364.
 Standard Oil Co. v. State of Missouri, 224 U. S., 270; 56 L. ed. 760.
 Consolidated Rendering Co. v. State of Vermont, 207 U. S. 541; 52 L. ed. 327.

"In every case it must appear that the Federal claim or right was interposed in the State Court. There is no jurisdiction to review State decisions which do not raise Federal questions."

Rose's Fed. Proc., Sec. 38 C. Vol. 1, p. 212 and cases cited.

The record must show that the Federal question was set up at the proper time and in the proper way.

Texas Etc. Ry. Co. v. Southern P. Co., 137 U. S., 53; 34 L. ed. 614.

Schuyler Nat. Bank v. Bollong, 150 U. S., 90; 37 L. ed. 1010.

Bobb v. Jamison, 155 U. S., 416; 39 L. ed. 206.

Sayward v. Denny, 158 U. S. 183; 39 L. ed. 941.

Rose's Fed. Proc., Vol. 1, p. 216.

In *Leeper v. State of Texas*, 139 U. S., 462; 35 L. ed. 225, this Court speaking through Mr. Chief Justice Fuller said:

"That to give this court jurisdiction to review the judgment of a state court under section 709 of the Revised Statutes, because of the denial by the state court of any right, title, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way. *Spies v. Illinois*, 123 U. S., 131, 181; 31 L. ed. 80-90; *Baldwin v. Kansas*, 129 U. S., 52; 32 L. ed. 640; *Chappell v. Bradshaw*, 128 U. S., 132; 32 L. ed. 369."

Mere errors and irregularities in administering State laws are beyond the revisory power of this Court.

Gibson v. Mississippi, 162 U. S., 565; 40 L. ed. 1075.

Leeper v. Texas, 139 U. S., 462; 35 L. ed. 225.

Duncan v. Missouri, 152 U. S., 377; 38 L. ed. 485.

In re Robertson, 156 U. S., 183; 39 L. ed., 389.
29 Enc. of Law, 247.

"The Supreme Court of the United States has emphatically and repeatedly said that in order to give that court jurisdiction on writ of error to the

highest court of the state in which a decision could be had, it must appear affirmatively, not only that a federal question was presented for decision, but that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Fowler v. Lamson, 164 U. S., 252; 17 Sup. Ct. 112; 41 L. ed. 424.

California Powder Works v. Davis, 151 U. S., 389; 14 Sup. Ct., 350; 38 L. ed. 206.

Eustis v. Bolles, 150 U. S., 361; 14 Sup. Ct. 131; 37 L. ed. 1111.

O'Neil v. Vermont, 144 U. S., 323; 12 Sup. Ct. 693; 36 L. ed. 450.

Brooks v. Missouri, 124 U. S., 394; 8 Sup. Ct. 443; 31 L. ed. 454.

Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632; 18 L. ed. 904.

Miller v. Nicholls, 4 Wheat. (U. S.) 311; 4 L. ed. 578.

Rose's Fed. Proc. Sec. 38 C. Vol. 1, p. 212 and cases cited.

2 Stnadard Proc., 244.

11 Cyc., 929-935-939.

In this case no Federal question was pleaded, proven or decided. It cannot be presented to this Court by request that the Court assume an asserted fact without it being shown by the record. It cannot be noticed without pleading, proof or presumption to support its existence.

"Since it is a decision against the Federal right or claim and not against the party raising it, that is reviewable, writ of error will not lie where the State decision is sustainable upon non-Federal grounds. Hence where the record shows a Federal and a non-Federal question, and the case was dis-

posed of below on the latter there is no right of review; or if it might have been so disposed of. Moreover, if the record does not show that the decision below was on the non-Federal ground yet error will not lie if a non-Federal ground is apparent upon which the decision might be rested; so that the decision would have been the same if no Federal question had been raised. The cases go even further and hold that where the decision rests on grounds broad enough to sustain judgment irrespective of the Federal question the Supreme Court will not take jurisdiction though the Federal question was wrongly decided."

Rose's Fed. Proc., Sec. 38 (J) vol. 1, p. 222 and cases cited.

29 Am. & Eng. Ency. of Law 247.

We respectfully submit that there was no Federal question involved either in the Trial Court or the Supreme Court of Nevada; that the case was decidable and was decided upon a non-Federal question, a question of practice and procedure under a state statute; that the Supreme Court has no jurisdiction to review, or revisory power over the decision of the highest tribunal of the State.

A. C. L. R. R. Co. v. Merino
242 N. 532

III.

CONTRACT NOT IN VIOLATION OF INTERSTATE COMMERCE ACT.

The contract in issue was not in violation of the provisions of Section 6 of the Act of June 29, 1906. (34 Stat. L. 586-1909 Supp. Fed. Stat. Ann. 261). It is certain that the defendant in error did not violate any

of the provisions of that Act, even if the plaintiff in error had failed to comply with the terms of the Act.

A contract for a special service, however, does not come within the letter or spirit of the Interstate Commerce Act. The contract was for a special and extraordinary service not common to the public, and which may never again be required. There was no similar contemporaneous service from which a discrimination could be shown. The rate paid was a sum greater and not less than the published rate. The amount paid for the special service was \$125.00, while the regular passenger fare between Reno and Doyle was \$3.25.

The defendant in error engaged a special train to bring his son, who had had both feet frozen, to Reno for medical and surgical treatment. Nevada and the eastern part of California are sparsely settled, and the station at Doyle offered no opportunity for such medical and surgical treatment. At the time the contract was made, it was winter, the weather was intensely cold, and the entire country deeply covered with snow. There were no means other than the N.-C.-O. Railroad of transporting the afflicted son from Doyle to Reno, and the engagement of the special train became imperatively necessary. We find nothing in the Interstate Commerce Act nor in the decision of any court that indicates that any rate for such special service under extraordinary circumstances requires the filing or publication of a schedule of rates. It cannot be presumed that Congress intended to deprive the railroad companies of a fair compensation for a special, extraordinary, and unusual service, nor on the other hand that Congress has deprived them of the power to render such special extraor-

dinary and unusual service in the succor of human life. Even if the law required a publication and posting of a schedule of rates for such special service, the plaintiff in error cannot be relieved of the obligations of its contract by its failure to comply with the law.

Merchants Cotton Press Co. v. Insurance Companies, 151 U. S., 368-387; 38 L. ed. 195-205.
 Mobile & O. R. Co. v. Dismukes, Ala. 10 So. 289.
 Pond-Dexter Lumber Co. v. Spencer, 86 Fed., 846.
 Insurance Companies v. Carrier Companies, 91 Tenn., 537; 19 S. W. 755.
 Ward v. Mo. Pacific Ry. Co., 158 Mo., 226; 58 S. W., 28.
 Altschuler v. Atchison Topeka & S. F. Ry. Co., 144 N. W., 294.

IV.

PLAINTIFF IN ERROR WILL NOT BE RELIEVED OF THE
 OBLIGATIONS OF ITS CONTRACT BECAUSE THE DEFENDANT IN ERROR IS NOT IN PARI DELICTO.

Both parties to the contract are charged with knowledge of the provisions of the Interstate Commerce Act, but there is nothing in law which charges the defendant in error with knowledge of the *FACT* that the plaintiff in error had not complied with that law. In this, the proposed amendment to the answer was deficient and did not state a defense to the action. The defendant in error did not know at the time of making the contract, and probably does not now know, that the railroad company had failed to comply with any provision of the law. He had a right to presume, as the law presumes, that plaintiff in error had fully complied with its pro-

visions. It was the railroad company only that could comply with the law, and the proposed amendment did not charge defendant in error with any guilty knowledge of the illegality of the contract.

Mobile & O. R. Co. v. Dismukes, (Ala.) 10 So. 289.
Mo. K. & T. R. Co. v. Bagley, (Kan.) 56, Pac.
759.

Western Union Telegraph Co. v. Henley, (Ind.) 60
N. E., 682.

This case does not come within the provisions of Section 1 of the Act of June 29, 1906 (35 Stat. L. 60-1909 Supp. to Fed. Stat. Ann. 255-257); nor does it come within the provisions of Section 7 of the Act of June 18, 1910 (36 Stat. L. 546-1912 Supp. to Fed. Stat. Ann. 114) providing penalties against any person who uses an "interstate *free* ticket, *free* pass, or *free* transportation."

Section 6 of the Act of June 29, 1906, provides a penalty alike for the *shipper and carrier of property* who violates its terms; but it provides no penalty for a *passenger* who contracts for, accepts and receives a service not scheduled, and pays therefor a rate not published or posted.

"The fact that the penalty is imposed on one of the parties alone shows clearly that the law does not consider them in *pari delicto*."

9 Cyc. 552-3 cases cited.

Union Gold Mining Co. v. Rocky Mountain Nat.
Bank, 96 U. S. 640-24 L. ed. 648.

St. Louis Union Nat. Bank v. Matthews, 98 U. S.,
621-25 L. ed., 188.

The Interstate Commerce Act was not enacted for the purpose of relieving railroads of their obligations, but for the purpose of protecting the public against discriminations. The defendant in error was neither particeps criminis, nor in pari delicto. Under such circumstances, plaintiff in error will not be allowed to plead its own violation of the law to avoid its obligations to a party innocent of any such violation.

9 Cyc., pages 550-551-552-553-554, and cases cited.
 Brooks v. Martin, 2 Wall., 70; 17 L. ed., 732.
 McBlair v. Gibbes. 17 How., 232; 15 L. ed., 132.
 Parkersburg v. Brown, 106 U. S., 487; 27 L. ed., 238.

There being no Federal question presented to this Court, and no error in the judgment of the Supreme Court of Nevada appearing, the writ of error should be dismissed and the judgment affirmed.

Respectfully submitted,

SARDIS SUMMERFIELD and JOHN E. RAKER,
Attorneys for Defendant in Error.

MACK, GREEN, BROWN, and HERR, *of Counsel.*

Dated this 24th day of July, 1916.

NEVADA-CALIFORNIA-OREGON RAILWAY v.
BURRUS.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

No. 237. Submitted April 30, 1917.—Decided May 21, 1917.

In an action against a carrier for breach of a contract to furnish an interstate train, the defendant objected when the trial opened that no rate for such trains had been filed with the Interstate Commerce Commission and, while the trial was in progress, offered an amend-

ment to the answer, setting up this defense. Under the state practice the defense was not cognizable unless pleaded, and the amendment, not having been suggested until months after the commencement of the action while other defenses had been interposed, was rejected by the state trial court as coming too late, and this ruling was affirmed by the State Supreme Court as a proper exercise of the trial court's discretion. It being evident that the decision merely enforced the state practice with no purpose to evade the claim of federal right, *Held*, that a writ of error from this court must be dismissed.

In the trial of an action against a carrier upon a contract for interstate transportation the plaintiff may be entitled to the presumption that the carrier filed such rates as were requisite to sustain the contract, the pleadings being silent on the subject.

Writ of error to review 38 Nevada, 156, dismissed.

THE case is stated in the opinion.

Mr. James Glynn for plaintiff in error.

Mr. Sardis Summerfield and *Mr. John E. Raker* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for breach of a contract to furnish plaintiff, (defendant in error,) a special train to carry him from Reno, Nevada, to Doyle, California, where his son was ill, and to bring the two back from that place. The plaintiff got a judgment, and the only question before us is whether any rights of the defendant under the Act to Regulate Commerce have been infringed. The ground on which such an infraction is alleged is that the trial court, after the trial had been going on for more than a day, refused to allow the answer to be amended so as to set up that no tariff rate for special trains had been filed by the defendant and that therefore the contract was illegal. The defendant had mentioned the point at the beginning of the trial but this was the first time that it was presented

in proper form under the state practice, although some months had elapsed since the beginning of the suit and demurrers and other defences had been interposed without suggesting this one. The Supreme Court of the State declined to overrule the discretionary judgment of the court below. 38 Nevada, 156.

Upon the question whether a claim of immunity under a statute of the United States has been asserted in the proper manner under the state system of pleading and practice "the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." *Atlantic Coast Line R. R. Co. v. Mims*, 242 U. S. 532, 535. The most that could be said in this case was that the Supreme Court was influenced in its judgment by the fact that the railroad, after treating the plaintiff very badly, was trying to escape liability by an afterthought upon a debatable point of law—not at all by the fact that the law involved was federal. The plaintiff had tried the case relying upon the presumption which was sufficient as the pleadings stood. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin*, 241 U. S. 319. The court reasonably might decline to put him to procuring other evidence from a distance, on the last day of the trial, upon a new issue presented after his evidence was in. We perceive no reason why this court should interfere with the practice of the State.

Writ of error dismissed.

THE CHIEF JUSTICE and MR. JUSTICE CLARKE dissent.